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FEDERAL COMMUNICATIONS COMMISSION

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FCC 74–381

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AM–FM PROGRAM DUPLICATION	} Docket No. 20016

NOTICE OF PROPOSED RULEMAKING

(Adopted April 10, 1974; Released April 16, 1974)

BY THE COMMISSION:

1. The Commission hereby seeks comments on proposed amendment of Section 73.242 of the Commission's Rules governing duplication of AM programming on commonly owned FM stations in communities of more than 100,000 population in the same local area.

2. A decade has passed since the Commission began its inquiry into the possibility of limiting the amount of AM station programming that might be duplicated by an FM station. The rule itself has been in effect for a number of years, and even though it has not been changed since it was adopted, circumstances have changed notably. The premises on which the rule was based have not changed, nor have the goals we wished to reach.[1] However, the change in circumstances suggests that the rule may no longer represent a fully satisfactory effort to reach these goals. Thus, we intend to explore whether the rule as it now stands still reflects a proper balance of the various interests involved or whether it needs to be amended to take the current situation into proper account. The information now before us, which will be discussed shortly, suggests a need to extend the coverage of the rule to smaller communities and/or to increase the amount of non-duplicated programming that some or all of the now affected stations must carry. In order to place this matter in perspective, we shall review the current rule and the documents pertaining to its adoption.

3. Examination of the matter of AM–FM program duplication began with the Commission's Notice of Proposed Rule Making in Docket No. 15084, FCC 63–468, 25 R.R. 1615 (1963). While the central focus of that Notice was on AM assignment standards, paragraphs 11–22 (at 1620 *et seq.*) dealt with the inter-relationship of AM and FM broadcasting and in particular the practice of AM–FM program duplication. The view tentatively expressed was that such duplication had served its purpose and the time was ripe to begin a process of ending or limiting such duplication. In part, this view was premised on a recognition of the fact that AM and FM were becoming joint components of a total aural service. With this in mind, the Commis-

[1] The rule was based on essentially three considerations: (1) the inherent inefficiency of duplication, (2) the limiting effect on independent FM development and the ability to compete, and (3) the stimulus to FM set sales which separate programming would provide.

sion was all the more concerned that duplication was wasteful of spectrum space. Accordingly, the Commission proposed a limit of 50% on the amount of AM programming that an FM station might duplicate, a limit which would apply to communities over 100,000 which had no vacant FM channels.

4. In the Commission's Report and Order, 45 F.C.C. 1515 (1964), the current Section 73.242 was adopted. It differed little from the proposal, with the exception that the presence of a vacant channel in a community no longer was to have significance.[2] Duplication was defined to include the 24-hour periods before and after AM broadcast as well as simultaneous duplication. Computation was to be on an "average week" basis, and the rule was not limited to cases where the AM and FM stations were licensed to the same city, so long as they were in the same local area. In computing the amount of duplication, special events, even if carried on both stations, were to be treated as separate programming. News, sports and public affairs were not exempted, by the 50% duplication permitted was thought to be more than sufficient to permit continuation of duplication for these program categories.

5. Various petitions for reconsideration were filed. Except for a delay in the effective date of the rule, the petitions were denied—45 F.C.C. 2092 (1965). In so doing, the Commission rejected a series of arguments made by the various parties. We shall discuss these points because they might well again be raised as to any extension of the current provisions of the rule. Absent data to establish that our prior judgments no longer apply, we do not expect to again have to cover the same territory. Rather, parties offering comments should direct their attention to the anticipatable impact of revision of the rule and not attempt to re-litigate settled issues.

6. In the Memorandum Opinion and Order denying the petitions, the Commission dealt with a number of issues. One argument was that the Commission was usurping the licensee's judgment in how best to respond to local needs. This the Commission rejected as without substance in view of the mandate of the provisions of Section 303 of the Communications Act to classify stations and specify the nature of the service to be rendered, and most importantly to encourage the more efficient use of radio. Duplication was considered inherently wasteful and inefficient and as such to be permitted only when substantial countervailing benefits were offered. The balance was struck at 50% and 100,000 population. Nor was the Commission persuaded by economic arguments about increased costs, technical arguments about how FM supplements AM coverage, programming arguments that increased costs lead to reduced program quality and finally the argument that the rule applied to the very cities with the most radio choices and hence in least need of the rule. Even so, the Commission acknowledged the likelihood of short-term detrimental economic impact, but this was a matter the Commission said would be treated pursuant to individual requests for temporary relief under paragraph (c) of the rule.

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[2] The Commission believed that few such channels would remain, as the demand seemed essentially equal to the supply, and that the rule could be more effectively administered without this provision.

7. The Commission adopted another Memorandum Opinion and Order the next year, 2 F.C.C. 2d 833 (1966), dealing with the large number of requests for exemption which had been filed. In addition to acting on these requests the document also set forth certain interpretations of the rule and again delayed the effective date. Even though the consideration in that document focused mostly on individual circumstances rather than those relating to all affected parties, one interpretation requires mention here: the Commission expressed a view that a large seasonal swing, even if it averaged out to 50% yearly (on a weekly basis) was not the result the rule contemplated. Rather, the Commission observed that ordinarily 30% separate programming in any week was to be considered as a minimum. This was thought to provide enough flexibility. We mention this point since we may wish to incorporate this (or a similar provision) in the rule itself.

8. This discussion brings us to the present and our belief that it is time to examine the situation anew and to determine if the rule should be modified. The operative facts have changed greatly in a number of respects. In the last 10 years the number of independent FM stations has doubled, average revenues per independent FM station have almost quadrupled and their total revenues have increased seven fold. The percentage of independent FM stations making a profit has also climbed significantly. Finally FM set penetration has proceeded apace. Moreover, it appears that as more separate programming was offered, more listened, and as more listened, revenues increased and so perhaps more were encouraged to program independently. We think it time to consider providing still further encouragement in this process.

9. When we adopted the cut-off of 100,000 population, most channels assigned to communities of such size or greater were or soon would be in use, but for smaller ones, the same was not true. Now, however, there are multiple filings for FM channels in communities even under 10,000. There are few channels available to places over 25,000 and virtually none to ones over 50,000. Therefore, we now invite comments on whether there should be a change in the cut-off, and if so, what a proper cut-off might be. If, for example, 50,000 were used as the cut-off, this would add 240 communities to the list of 156 now affected and increase the total population of the cities covered by the rule from 56,518,804 to 73,258,934.[3]

10. What then for stations already under the rule, i.e., stations in communities of over 100,000 population? For such stations we propose a possible strengthening of the rule to prohibit all duplication except for news and public affairs. There are two reasons for such an exemption. Both news and public affairs have time as an important factor and both are crucial to the function of a democratic society. While for sports, even if time is of importance, the need for duplication does not rest on a similar foundation. With sports programming the

[3] Of course the community of license population figure is not reflective of station coverage, for reception service extends to areas outside the city of license. Even in cities near the 50,000 level, the reflective population served is usually two to five times the city figure. Thus, we are not dealing with the possibility of applying a rule to a station serving just 50,000 persons, for that would not be the case. Using sample figures from cities near 50,000 population, the number of persons reached runs from 100,000 to 1,417,000.

countervailing benefits do not overcome the inherent wastefulness of duplication. Although data are lacking (something we hope this proceeding can help correct) we suspect that many stations in communities of over 100,000 population are already in compliance with the proposal or are close to it. In any event, the need for duplication as it once existed may no longer obtain, and thus we wish to consider a second step which will more accurately reflect the current state of FM development.

11. Commenting parties need not restrict themselves to any particular population or percentage figures. If they wish to suggest others, they should do so and in so doing indicate why they believe that our suggested figures are not appropriate.[4] We also wish commenting parties to consider a possible rule which would encourage extended hours of broadcasting by not counting the period of midnight to 6:00 a.m. in computing the amount of non-duplication required. Thus, assuming both the AM and FM stations are full-time and if a 50% limit prevailed overall, 12 hours would be separately programmed on the FM. If the above approach were used excluding the midnight–6:00 a.m. period would leave 18 hours and hence 9 hours of separate programming as the requirement. We would not favor such an approach if it led to a reduction in separate programming as would be the case if many affected stations already operate 24 hours a day. Data from the parties could be helpful in evaluating this problem.

12. Comments are invited on any pertinent aspect of the issues here involved. The Commission will not be limited to the approach tentatively expressed, but rather wishes to explore other possibilities which might better further the underlying goals expressed a decade ago. Thus the central issue is how the Commission might best proceed to attain these objectives. Since some of the material to be submitted may require research or the compilation of statistical information we shall provide 90 days for the submission of comments and 30 days for the submission of reply comments.

13. In accordance with the above discussion and pursuant to Sections 4(i), 303 (a), (b), (g), and (r) of the Communications Act of 1934, as amended, rule making IS PROPOSED.

14. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's rules, interested persons may file comments on or before July 25, 1974, and reply comments on or before August 26, 1974. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding.

15. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

16. In accordance with the provisions of Section 1.419 of the Rules, an original and 14 copies of all comments, replies, pleadings, briefs, and other documents shall be furnished the Commission. All filings

[4] Parties may also wish to discuss non-population based guidelines for extending the rule, but in so doing they should offer suggestions on how such an approach might be efficiently administered.

made in this proceeding will be made available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R–125

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of BROADCASTERS 7, INC., WEST HAZLETON, PA. For Construction Permit	Docket No. 18491 File No. BP–17498

APPEARANCES

John B. Kenkel, on behalf of Broadcasters 7, Inc.; and *David G. Richard*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted April 3, 1974; Released April 10, 1974)

BY THE REVIEW BOARD: BERKEMEYER AND PINCOCK. BOARD MEMBER NELSON DISSENTING AND VOTING FOR CERTIFICATION WITH STATEMENT.

1. This proceeding involves the application of Broadcasters 7, Inc. (Broadcasters) for a new Class III standard broadcast station at West Hazleton, Pennsylvania.[1] Administrative Law Judge Charles J. Frederick released an Initial Decision, FCC 72D–59, on September 6, 1972, in which he concluded that Broadcasters' application must be denied under the Suburban Community issue since Broadcasters had failed to establish that it would not be a Hazleton rather than a West Hazelton outlet and the applicant could not meet the technical provisions of Rule 73.37 for a standard broadcast station assigned to Hazleton. Exceptions and a brief in support thereof were filed by the applicant and the Broadcast Bureau filed a reply to exceptions. The Review Board has considered the Initial Decision in light of the exceptions, its examination of the record and the arguments of the parties.[2] We note that the Presiding Judge's findings of fact are thorough and accurate in all significant respects and that Broadcasters primarily excepts to the conclusions of law reached by the Presiding Judge rather than to his findings. Thus, except as modified herein and in the rulings on exceptions contained in the attached Appendix, the Presiding Judge's findings of fact are adopted. The Board is also in basic agreement with the Presiding Judge's conclusions with respect to the various elements of proof under the Suburban Community issue and with his

[1] By order, FCC 69–237, 34 FR 5663, published March 26, 1969, Broadcasters' application was designated for hearing with the mutually-exclusive applications of Summit Broadcasting (Summit) and CBM, Inc. (CBM); however, by Memorandum Opinion and Order, FCC 71M–1741, released November 5, 1971, the Administrative Law Judge, *inter alia*, permitted the three applicants to merge, thereby dismissing the Summit and CBM applications. Prior to this dismissal the Review Board had enlarged the issues in the proceeding to include a Suburban Community issue against all three applicants (18 FCC 2d 470, 16 RR 2d 733 (1969)).

[2] Oral argument was held before a panel of the Review Board on February 12, 1974.

ultimate determination; the conclusions are therefore also adopted. In view of the arguments advanced by Broadcasters, however, some brief amplification of the Judge's decision is required.

2. The relevant elements of proof under the Suburban Community issue are clearly defined by the specified issue [3] and, as a consequence, Broadcasters' argument that it has not been sufficiently apprised of the nature of the evidence it is required to adduce must be rejected.[4] As a related matter, Broadcasters' assertion that the Presiding Judge erroneously applied the presumption set forth in the Commission's *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 6 RR 2d 1901 (1965), rather than a lesser standard of proof allegedly applicable to instances where the communities involved have populations of less than 50,000 is specious.[5] Whether a Suburban Community issue is specified because the applicant's proposal automatically falls within the Policy Statement presumption (because it meets the 5 mv/m-50,000 population test) or because a threshold showing warranting the addition of the issue is made, does not alter the question to be resolved, that is, whether an applicant intends to serve its community of license or a larger community. In short, the issue as framed, and the criteria set forth in the Policy Statement for determining whether an applicant realistically intends to serve its community of license, are similar no matter how the issue arises. In contrast, the quantum of proof necessary to meet the issue is determined by the engineering characteristics of the proposal, not by the manner in which the issue arises. See paragraph 3, *infra*.

3. In this connection, Broadcasters argues that the Presiding Judge failed to consider the public interest benefits of early inauguration of service, which would result from its proposed use of an abandoned transmitter and antenna site. Its argument that this public interest benefit relieves it of some measure of its evidentiary burden under the specified issue clearly must be rejected. It is well established that the engineering characteristics of a particular proposal affect the quantum of proof necessary to satisfy the standard as it is applied to a given situation. *Lebanon Valley Radio, Inc.*, 35 FCC 2d 243, 24 RR 2d 586 (1972), review denied FCC 73–226, released March 6, 1973;

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[3] The issue, as specified, reads as follows:

(1) Whether (the applicant) will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all the relevant evidence, including but not limited to, evidence showing:

(a) The extent to which the specified location has been ascertained by the applicant to have separate and distinct program needs;

(b) The extent to which needs of the specified station location are being met by existing standard broadcast facilities;

(c) The extent to which the applicant's program proposals will meet the specified unsatisfied needs of the specified station location; and

(d) The extent to which the projected sources of the applicant's advertising revenues within the specified location are adequate to support its proposal.

(2) If it is concluded pursuant to the foregoing issue (1) that the proposal of the applicant will not realistically provide a local transmission service for its specified community, whether such proposal meets all the technical provisions of the rules for standard broadcast stations assigned to Hazleton, Pennsylvania.

[4] Broadcasters has requested remand in the event the Board does not reverse the Presiding Judge's Decision. The applicant has not raised any matters in its exceptions which cannot be resolved upon the present record and thus this contingent request will be denied. *Cf. WNAR, Incorporated*, 41 FCC 2d 110, 27 RR 2d 1119 (1973), reconsideration denied, FCC 73R–346, 42 FCC 2d 1124 (1973).

[5] See *V.W.B. Inc.*, 8 FCC 2d 744, 10 RR 2d 563, reconsideration denied, 10 FCC 2d 534, 11 RR 2d 653 (1967), and *Harry D. Stephenson and Robert E. Stephenson*, 33 FCC 2d 749, 23 RR 2d 760 (1972), review denied FCC 73–85, released January 23, 1973.

Harry D. Stephenson and Robert E. Stephenson, *supra*, and *Kittyhawk Broadcasting Corp.*, 20 FCC 2d 1001, 18 RR 2d 125 (1970), review denied FCC 70–891, released August 26, 1970; also see *Policy Statement*, *supra*. And it is equally clear that Broadcasters' technical proposal is of such a nature as would ordinarily necessitate a heavy burden (*e.g.*, its proposed transmitter site is located 1.5 miles east southeast of the center of Hazleton and 2.15 miles southeast of the nearest corporate boundary of its specified community, its proposed 5.0 mv/m contour would completely cover both communities and its 25 mv/m contour would cover all of Hazleton, but would fail to cover 15% of its specified community of license). Thus, the technical characteristics of the proposed transmitter site, rather than lessening the applicant's evidentiary obligation, serve to increase its burden. As a result, any public interest benefits which allegedly could flow from utilization of the existing facilities cannot be regarded as more than negligible factors in our application of Suburban Community standards.

4. One additional matter raised by Broadcasters merits specific consideration. Broadcasters asserts that the Presiding Judge erred in failing to give "credence" to a "Study of Local Government in the Greater Hazleton Area", which was used by the applicant as a primary basis for establishing demographic characteristics of the area and thus was an admittedly critical element in its attempt to meet the separate and distinct programming needs sub-issue. In our view, the Presiding Judge properly refused to accord substantial weight to the Study because of the applicant's clear failure to demonstrate its reliability.[6] Broadcasters failed to show who prepared, evaluated and wrote the Study and the methodology employed in so doing, all of which are necessary elements in providing an adequate foundation for reliance on the study.

5. In view of the above, the Board agrees with the Presiding Judge that Broadcasters has failed to establish that it would not be a Hazleton rather than a West Hazleton outlet; nor has the applicant shown that it could meet technical provisions of Rule 73.37 for a standard broadcast station in Hazleton. Therefore, we are of the view that a grant of Broadcasters' application would not serve the public interest, convenience and necessity.

6. Accordingly, IT IS ORDERED, That the application of Broadcasters 7, Inc. (File No. BP–17498) for a new Class III standard broadcast station at West Hazleton, Pennsylvania, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
DEE W. PINCOCK,
Member, Review Board.

[6] Compare *Northern Indiana Broadcasters, Inc.*, 13 FCC 2d 546, 13 RR 2d 615 (1968).

APPENDIX

Rulings on Exceptions of Broadcasters 7, Inc.

Exception No.	*Ruling*
1, 15	Denied. Broadcasters' showing in this regard is defective because of its failure to show the separate and distinct program needs of West Hazleton, not because of the nature of the needs ascertained by the applicant. As a consequence, Broadcasters' showing would be defective regardless of the precise definition of program needs employed in evaluating its ascertainment efforts.
2, 5, 7, 9, 17, 24, 60	Denied as being of no decisional significance.
3	Denied for the reasons stated in paragraph 2 of this Decision.
4	Denied. Contrary to the applicant's assertion, Broadcasters' proposed utilization of the transmitter site formerly used by Hazleton Station WHZN increases the quantum of evidentiary showing it must make; Broadcasters' engineering proposal, including its choice of transmitter site, would result in more extensive coverage of Hazleton than of West Hazleton, its proposed city of license. See paragraph 3 of the Decision.
6, 8, 14, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 37, 42, 43, 44, 47, 48, 49, 50, 51, 52, 53, 57, 58, 62.	Denied. The Presiding Judge's findings (and/or conclusions) adequately and accurately reflect the record.
10, 11	Denied. *V.W.B. Inc.*, 8 FCC 2d 744, 10 RR 2d 563 (1967) reconsideration denied 10 FCC 2d 534, 11 RR 2d 653 (1967) and *Madison County Broadcasting Co., Inc.*, 8 FCC 2d 752, 10 RR 2d 587 (1967), stand for the proposition for which they were cited by the Administrative Law Judge. See paragraphs 3 and 4 of this Decision for more extensive discussion.
12	Granted. The record reveals that Broadcasters relied on the following demographic documents as well as J. J. McCluskey's personal knowledge for the selection of community leaders: U.S. Bureau of Census material; "A Study of Local Government in the Greater Hazleton Area", by the Institute of Public Administration, The Pennsylvania State University; Greater Hazleton Community-Area New Development Organization, Inc.; "Hazleton in Action"; "Plant Location Data" by the Pennsylvania Power and Light Co.; and Chamber of Commerce material. Also, see Ruling on Exception 13, infra.
13	Granted. The record reveals that Broadcasters employed a two-step process of gathering demographic data and selecting community leaders in its ascertainment efforts.
16	Denied for the reasons stated in paragraph 4 of this Decision.
25, 26	Denied. The Presiding Judge listed the needs and problems of Hazleton and West Hazleton according to their ascertained priority in the two communities.
30	Granted. WILK's programs appear to be directed to the general Hazleton area and, with the possible exception of one program, not to West Hazleton specifically.
31, 33, 34, 35, 39, 40.	Granted to the extent that the existence of area-wide (or Hazleton proper) programming is not necessarily probative of whether the needs of West Hazleton are being met by existing broadcast facilities, and denied in all other respects since the Judge's findings adequately and accurately reflect the record.

Exception No.	*Ruling*
32	Denied. The Presiding Judge correctly characterized Station WYZZ's opinion as such.
36, 38, 41, 45	Denied. The applicant's assertion that WAZL's programming was designed for the purpose of this hearing cannot be accepted; other than the timing, there is no evidence that the relevant programming was designed for that purpose. Moreover, since Broadcasters has failed to demonstrate the separate and distinct needs of West Hazleton, the question of whether or not these needs are being met by existing stations, including WAZL, is of minimal significance.
46	Granted to the extent that a comparison of the percentages of time Broadcasters proposes to devote to news as opposed to the percentages currently presented by Station WAZL is not probative of the Suburban Community issue, and denied in all other respects as unsupported by the record evidence.
54	Denied. The Presiding Judge correctly characterized J. J. McCluskey's testimony concerning advertising revenue commitments. Broadcasters' showing in this regard was an offer of proof and thus not accepted into evidence.
55, 56	Denied. The Presiding Judge did not err in refusing to accept Broadcasters' Exhibits 6, 7, and 8 into evidence. None of principals sponsoring the proffered exhibits appeared as witnesses, and thus the exhibits were properly accepted as offers of proof.
59	Denied for the reasons stated in paragraphs 2 and 3 of this Decision.
61, 63, 64	Denied for the reasons set forth in this Decision.

DISSENTING STATEMENT OF BOARD MEMBER JOSEPH N. NELSON

I would certify this proceeding to the Commission on the grounds set forth in the Board's Order in *WHJB Radio*, FCC 73R–125, issued March 23, 1973, 26 RR 2d 1588. In the latter case, the Board set aside its prior Decision and certified the proceedings to the Commission on the basis of the decision of the U.S. Court of Appeals in *Northern Indiana Broadcasters, Inc.* v. *FCC*, 148 U.S. App. D.C. 327, 459 F.2d 1351, 23 RR 2d 2113 (1972). At this writing, the Commission has not issued its decision in *WHJB Radio*.

FCC 72D-59

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of BROADCASTERS 7, INC., WEST HAZLETON, PA. For Construction Permit	Docket No. 18491 File No. BP-17498

APPEARANCES

Thomas W. Fletcher (Cole, Zylstra & Raywid) on behalf of Broadcasters 7, Inc; *Aloysius B. McCabe* (Kirkland, Ellis & Rowe) on behalf of WAZL Broadcasting; and *Katherine Savers McGovern* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER CHARLES J. FREDERICK

(Issued August 29, 1972; Released September 6, 1972)

PRELIMINARY STATEMENT

1. By Memorandum Opinion and Order (FCC 69-237; 27819), released March 21, 1969, the Commission designated for hearing the mutually exclusive applications of Richard S. Genetti, Edward F. Genetti, Salvadore Gaudiano, Jr., and James Manganell (a partnership), d/b as Summit Broadcasting (hereinafter Summit), Freeland, Pennsylvania, CBM, Inc. (hereinafter CBM), West Hazleton, Pennsylvania, and Broadcasters 7, Inc. (hereinafter Broadcasters 7), West Hazleton, Pennsylvania. The issues specified were:

1. To determine the areas and populations which would receive primary service from the proposed operations and the availability of other primary service to such areas and populations.

2. To determine, with respect to the application of Summit Broadcasting:

(a) The manner in which the applicant will obtain additional funds to construct and operate the proposed station for one year.

(b) Whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

3. To determine the efforts made by Summit Broadcasting to ascertain the community needs and interests of the area to be served and the means by which they propose to meet those needs and interests.

4. To determine, with respect to the application of CBM, Inc.:

(a) Whether Alphonse Barlett is willing to be a guarantor of the $15,000 bank loan.

(b) Whether the $15,000 bank loan and the credit letter from the equipment manufacturer are still available and, if so, the terms and conditions thereof.

(c) Whether, in light of the evidence adduced pursuant to (a) and (b) above, the applicant is financially qualified.

5. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

6. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b),

which of the operations proposed in the above-captioned applications would, on a comparative basis, better serve the public interest.

7. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if any, of the applications should be granted.

2. In a Memorandum Opinion and Order (FCC 69R–281; 34198)[1], released June 27, 1969, the Review Board enlarged to include the following Suburban Community issue:

To determine, with respect to CBM, Inc., Broadcasters 7, Inc. and Summit Broadcasting:

1. Whether each such applicant will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all the relevant evidence, including but not limited to, evidence showing:

(a) The extent to which the specified location has been ascertained by the applicant to have separate and distinct program needs;

(b) The extent to which needs of the specified station location are being met by existing standard broadcast facilities;

(c) The extent to which the applicant's program proposal will meet the specified unsatisfied needs of the specified station location; and

(d) The extent to which the projected sources of the applicant's advertising revenues within the specified station location are adequate to support its proposal.

2. If it is concluded pursuant to the foregoing issue (1) that the proposal of the applicant will not realistically provide a local transmission service for its specified community, whether such proposal meets all of the technical provisions of the rules for standard broadcast stations assigned to Hazleton, Pennsylvania.

3. On July 30, 1971, the applicants petitioned the Examiner for approval of a merger agreement, dismissal of the CBM and Summit applications, and amendment of the Broadcasters 7 application. On November 5, 1971, by Memorandum Opinion and Order (FCC 71M–1741)[2], the Examiner granted the joint petition. As a result of this Order, the sole remaining issue was the Suburban Community issue specified against Broadcasters 7. On November 22, 1971, Broadcasters 7, through its attorneys, filed a motion to delete the Suburban Community issue. By Memorandum Opinion and Order (FCC 72R–20; 81039)[3], released January 24, 1972, the Review Board denied Broadcasters 7's motion to delete. On January 5, 1972, the hearing on the Suburban Community issue commenced. Hearing sessions were held on January 5, January 6, February 14, and March 15, 1972. The record was closed on March 15, 1972. On February 7, 1972, a petition for leave to intervene was filed by Hazleton Broadcasting Company, licensee of WAZL and WVCD (FM), Hazleton, Pennsylvania. By Order (FCC 72M–210; 81842), released February 16, 1972, the Examiner formalized his ruling, made orally at the February 14, 1972 hearing, which denied the WAZL petition for leave to intervene. On February 17, 1972 WAZL filed an appeal from the Examiner's ruling, *supra*, before the Review Board. By Memorandum Opinion and Order (FCC 72R–68, 33 FCC 2d 983), released March 21, 1972, the Review Board denied WAZL's appeal.

[1] 18 FCC 2d 470, 16 RR 2d 733.
[2] FCC 2d.
[3] 33 FCC 2d 275.

FINDINGS OF FACT

4. Broadcasters 7, Inc. proposes to operate a new Class III standard broadcast station at West Hazleton, Pennsylvania on 1300 kHz with five kilowatts power, daytime only, utilizing a directional antenna.

5. West Hazleton, Pennsylvania is a borough of 6,059 persons (1970 Census) located immediately adjacent to the northwest corner of the city of Hazleton, Pennsylvania, population 30,426. West Hazleton is elongated and irregular in shape and extends some three miles in a northwest-southeast direction. West Hazleton and Hazleton are both located in Luzerne County, population 342,301. Neither is the county seat nor part of any urbanized area; however, both are situated in the Wilkes-Barre-Hazleton Standard Metropolitan Statistical Area, which consists of Luzerne County. No AM, FM or TV stations are assigned to the community. Hazleton has one AM station (WAZL, 1490 kHz, 250 W, 1 kw–LS, U, Class IV), one FM station (WVCD, formerly WAZL–FM, 97.9 MHz, 2.6 Kw, 670 ft., Class B) and no TV stations. UHF television Channel 56 is assigned for use in Hazleton.

6. Broadcasters 7 proposes to use the same transmitter site and two antenna towers and ground system formerly used by defunct Station WHZN. The site is located about 1.5 miles east southeast of the center of Hazleton just outside the city limits and 2.15 miles southeast of the nearest corporate boundary of West Hazleton. The proposed directional antenna pattern differs from that of former Station WHZN and is designed to provide maximum energy of 540 to 575 mv/m toward West Hazleton and Hazleton and minimum energy of 43 to 62 mv/m in the opposite direction. *Since the community of Hazleton is closer to the transmitter site, it will receive a stronger signal than West Hazleton.* The proposed 25 mv/m contour covers all of Hazleton and about 85% of West Hazleton. The proposed 5.0 mv/m contour covers both communities.

7. From radiation values shown on the proposed directional antenna pattern and on ground conductivity values from proof-of-performance measurements on former Station WHZN and from Figure M–3 of the Rules where not measured, the proposal would provide primary service (0.5 mv/m or greater) to 127,995 persons in an area of 1,080 square miles. Urban areas which would receive primary service (2.0 mv/m or greater) contain 44,595 persons residing in the communities of West Hazleton, Hazleton, Freeland (pop. 4,784) and McAdoo (pop. 3,326), Pennsylvania.

8. Stations WARM, Scranton, WNAK, Nanticoke, WILK, Wilkes-Barre, WLSH, Lansford, and WAZL, Hazleton, Pennsylvania provide AM primary service (2.0 mv/m or greater) to the communities of West Hazleton, Hazleton and Freeland, and Stations WLSH and WAZL serve the community of McAdoo. In addition, FM Stations WYZZ and WBRE–FM, Wilkes-Barre, WVCD (formerly WAZL–FM), Hazleton, and WAVT–FM, Pottsville, Pennsylvania provide FM service (1.0 mv/m or greater) to all four communities. Thus, the four communities receive in excess of five daytime aural services.

9. Stations WHLM, Bloomsburg, WNAK, Nanticoke, and WILK, Wilkes-Barre, Pennsylvania provide AM primary service (0.5 mv/m or greater) to all of the rural areas proposed to be served. In addition, Stations WARM and WEJL, Scranton, WCNR, Bloomsburg, WKOK, Sunbury, WYNS, Lehighton, and WAZL, Hazleton, Pennsylvania serve portions thereof. Thus, from five to eight AM services are available to any one portion.

10. When Station WHZN (formerly WTHT) was authorized in Hazleton, it received co-channel objectionable interference from Station WFBR, Baltimore, Maryland (1300 kHz, 5 Kw, DA-1, U, Class III) in a crescent-shaped area having a maximum width of 2.3 miles located along the southern half of the WHZN 0.5 mv/m normally protected contour. The interference area included 4,552 persons in an area of 65 square miles representing 4.7% of the population (96,040 persons) and 11.1% of the area (585 square miles) within WHZN's 0.5 mv/m contour. By comparison, the proposed operation would receive co-channel objectionable interference from Station WFBR in a crescent-shaped area having a maximum width of four miles located along the southern half of the proposed 0.5 mv/m normally protected contour. This interference area includes 11,394 persons in an area of 108 square miles representing 8.2% of the population (139,389 persons) and 9.1% of the area (1,188 square miles) within the proposed 0.5 mv/m contour. The objectionable interference suffered by the proposal thus surpasses that suffered by former Station WHZN by 6,842 persons and 43 square miles and for the most part falls in different areas. Under the present provisions of Section 73.37 of the Rules, the subject application would not be acceptable for filing if Hazleton were specified as the station location because it would provide a second outlet to Hazleton and would involve prohibitive overlap between the proposed 0.5 mv/m contour and the 0.025 mv/m contour of Station WFBR.

11. *The extent to which the specified station location has been ascertained by the applicant to have separate and distinct program needs.* As noted, *supra*, the Borough of West Hazleton is a community of 6,059 (1970 U.S. Census), which is located contiguously to the city of Hazleton, a community of 30,426 (1970 U.S. Census) in central Pennsylvania. Specifically, the southeastern portion of West Hazleton and the northwesternly section of Hazleton interlock like two pieces of a jigsaw puzzle. By merely crossing the street, one may move from Hazleton to West Hazleton.

12. The applicant could not specify the city of Hazleton as a station location because such operation from such city with the power proposed would be in technical violation with the prohibited overlap rules, Section 73.37. Solely on the technical proposal involved, a strong presumption arises that it is the larger city of Hazleton which will be provided with a local transmission facility rather than West Hazleton. (*W.W.B., Inc.*, 8 FCC 2d 744. *Madison Broadcasting, Inc.*, 18 FCC 2d 752.) This presumption arises because the applicant's 25 mv/m contour completely covers the larger city of Hazleton but not West Hazleton, the city of assignment; and the city of Hazleton stands physically between the applicant's proposed studio and transmitter site and West Hazleton, the proposed city of location. It, therefore, is necessary to

examine the facts of record to determine whether such presumption has been rebutted.

13. None of the principals of Broadcasters 7 lives in West Hazleton. Eleven of the 14 principals live in Hazleton. In an attempt to ascertain the extent to which West Hazleton has separate and distinct program needs from Hazleton, the larger community, the principals of Broadcasters 7 conducted a survey and investigation of West Hazleton and immediate environs. Following the format of the Commission's *Primer* on the ascertainment of community problems, various persons considered community leaders and the general public were contacted to determine the existing needs and interests of the area. In response to a question of how they determined the community leaders in the city of Hazleton, one McCluskey (a principal of Broadcasters 7 who was sponsoring Broadcasters 7 Exhibits 1–4) stated "I had been in the community long enough that I think I would know people who would have knowledge of the city's needs by reason of their activities, politically, socially, and economically." (Of particular interest with regard to the acquisition of demographic data is the almost total reliance placed by the applicant on certain parts of a "Study" written in 1967. This "Study" is discussed more fully at para. 14, *infra.*) An additional factor important to his determination was the desire to obtain a broad representation of the leaders of the community. Although the ministerial association presumably included membership of ministers in Hazleton and West Hazleton, no one in that organization was contacted. Importantly, McCluskey, while familiar with Hazleton and the bases for selection of leaders therein, was unable to testify with respect to the bases for selection of leaders in West Hazleton.

14. The applicant analyzed the results of its surveys and identified the following over-all needs and interests: recreational requirements; municipal government informational problems; unemployment; schools; drug abuse; roads and streets; traffic problems; taxes; medical facilities; pollution; housing; and urban development. Problems specifically identified with Hazleton and/or West Hazleton were listed as follows:

West Hazleton	*Hazleton*
1. Recreational requirements	1. Municipal government
2. Schools	2. Schools
3. Roads and streets	3. Recreational requirements
4. Drug abuse	4. Taxes
5. Municipal government informational problems	5. Housing
6. Traffic problems	6. Unemployment
7. Taxes	7. Drug abuse
8. Pollution	8. Traffic problems
9. Unemployment	9. Roads and streets
10. Housing	
11. More medical facilities	

The applicant attempted to demonstrate that West Hazleton has separate and distinct program needs from Hazleton by comparing the percentage of persons in West Hazleton who identified a particular problem with the percentage of persons in Hazleton who identified the same or a similar problem. The applicant included in its attempt to meet the separate and distinct program needs aspect of the Suburban Community issue the narrative, charts and statistics found in pp. 5–24

of its Exh. 1. The material comes almost totally from a document entitled "The Study of Local Government in the Greater Hazleton Area." This "Study" was produced by students at the Institute of Public Administration, Pennsylvania State University, in 1967 and ostensibly compared the communities in the greater Hazleton area. While the applicant's witness knew that students conducted the interviews contained therein, he did not know who the students were, nor who evaluated and wrote the "Study." Over strenuous objection of the Bureau, this material was received into the record. The Examiner is giving this material no credence. It should be well-known that admission into evidence is not a bond for relevancy, materiality, and competency.

15. One of the applicant's principals and the vice-president of the corporation, J. J. McCluskey, sponsored Broadcaster 7's exhibits 1–4. By oral testimony, more fully discussed, *infra*, McCluskey described the applicant's survey efforts, the degree of economic, social and governmental separateness of West Hazleton from Hazleton, how the applicant determined whether there existed needs which were separate and distinct from Hazleton's and were unsatisfied by existing broadcast facilities, the programs the applicant proposed to meet these needs, and the sources of revenue within West Hazleton.

16. The Borough of West Hazleton has its own mayor-council government, its own fire and police departments, its own retail establishments, its own street and sewage maintenance employees, and its own magistrate's court. However, the Borough of West Hazleton's water is supplied by the Hazleton City Authority, its sewage is treated by the Greater Hazleton Joint Sewer Authority, its electricity from the Pennsylvania Power and Light Company, whose office is in Hazleton. Educational facilities and schools are operated by the Hazleton Area School District. West Hazleton receives news coverage from the *Hazleton Standard-Speaker*, a twice daily newspaper. Its hospital facilities are in Hazleton, its public library in Hazleton, its mail goes through the U.S. Post Office in Hazleton, and the local airport is run by Hazleton. Additionally, West Hazleton, along with Hazleton and other surrounding communities, is a member of the Lower Luzerne County Reclamation and Recreation Committee, a regional land reclamation coordinating body; and the Lower Luzerne County Solid Waste Management Authority, a regional refuse disposal agency.

17. In 1960, West Hazleton annexed a portion of Valmont Industrial Park.[4] West Hazleton and Hazleton are represented on the Board of Directors which, operating through CAN–DO (a community-wide industrial development organization), overseas the community's efforts to encourage and foster industrial development throughout the Greater Hazleton area. The land for Valmont Industrial Park was first purchased by CAN–DO prior to development, and then resold to industries which would locate there. Among the CAN–DO members are the Greater Hazleton Chamber of Commerce and the various fraternal and civic organizations throughout the community. Although the Park

[4] This was apparently a fortuitous move because, according to the 1970 U.S. Census, PC(1)–A40 Pa., (Official Notice) West Hazleton's population in 1970 reflects a 40.2% loss when compared with the area counted in the 1960 Census. If only the 1960 area is considered in comparing the 1970 population, a decrease of 2,530 persons is shown. Since West Hazleton annexed various areas between 1960 and 1970, it showed a population increase of 2,311 in the 1970 Census. The Census shows no annexation for Hazleton.

has been partially annexed by West Hazleton, CAN-DO maintains its headquarters in Hazleton. No information was supplied as to where most of the workers in Valmont Industrial Park live.

18. All of the state or federal agencies serving the Greater Hazleton Area maintain their offices in Hazleton. This is typical also with respect to groups or organizations, e.g., the Greater Hazleton Area Chamber of Commerce, the Greater Hazleton United Fund (20 of its 21 constituent agencies are located in Hazleton), the Kiwanis Club, the Rotarians, the Greater Hazleton Fine Arts Council, the Greater Hazleton Industrial Council, the Advisory Committee on Education, the Hazleton Art League, the Greater Hazleton Oratorical Society and the Hazleton Soroptomist Club. Both Hazleton and West Hazleton have state police barracks located within their boundaries.

19. *The extent to which the needs of West Hazleton are being met by existing broadcast facilities.* In its attempt to meet this element of the Suburban Community issue, the applicant submitted the answers to interrogatories which had been sent on June 19, 1970 to all AM and FM stations placing a 2 mv/m (AM) or 1 mv/m (FM) contour over West Hazleton. These stations were WAZL and WVCD (FM), Hazleton; WILK, Wilkes-Barre; WLSH, Lansford; WAVT-FM, Pottsville; WBRE-FM, Wilkes-Barre; WYZZ (FM), Wilkes-Barre; and WNAK, Nanticoke.[5] (Broadcasters 7 Exh. 2, pp. 3-14.)

20. *WILK*, Wilkes-Barre, responded that the communities to which it particularly directed its service included Hazleton, as well as smaller communities within Luzerne County. Presumably, that included West Hazleton. In the period May 1-June 23, 1970,[6] WILK broadcast a total of 14 news stories concerning the Hazleton Area, of which West Hazleton is a part. These news stories included: University of Pennsylvania Construction on Campus in West Hazleton; a drowning; Hazleton Area School Board Fund Issue; Convention of Pennsylvania Firemen in Hazleton; Election Returns; Hazleton Girl Wins Award; Hazleton Woman Sought by FBI; Synod of the Lutheran Church Meeting in Hazleton; Vocational-Technical Training Offered in Hazleton Area Schools; Automobile Fatality; Labor Strike; Head-Start Program Offered; Unemployment Figures for the Area. Events which affect a major portion of the Hazleton area population are considered by the WILK news department in determining the amount of news used from the Hazleton area.

21. WILK maintains a cooperative tie-in with the local Hazleton station (WAZL) "for direct and instant news coverage from that area," subscribes to the Hazleton paper, and encourages "stringers" to keep WILK informed of local happenings in the Hazleton area. Public service announcements on behalf of groups or organizations in the Hazleton area are broadcast by WILK, but no such announcements were received from West Hazleton in the period [7] specified by the in-

[5] An interrogatory was sent to WARM; but the response was deleted from the exhibit since WARM does not render primary service to West Hazleton.

[6] The interrogatories specified particular time periods with respect to certain types of programming: News—May 1, 1970 to the date of response; PSA—the seven days immediately preceding receipt of the interrogatories; Educational—during preceding week; Public Affairs—past six months; Editorials—last six months; Political—last local election campaign; Sports—last six months; and Programs of Local Talent—last six months.

[7] June 16, 1970 to June 23, 1970.

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terrogatories. WILK broadcasts information on school closings and re-openings in West Hazleton. WILK aired a program, "Focus," which dealt with industrial development and information regarding Valmont Park in West Hazleton in the period specified in the interrogatories. WILK broadcast no editorials concerning West Hazleton in the six month period [8] specified by the interrogatories, but did broadcast two editorials concerning the Hazleton area: one was about the Hazleton city school board and the other was about the Hazleton Mummers Parade. WILK broadcasts weather information regarding West Hazleton, and contacts advertising clients in the Greater Hazleton area.

22. *WLSH*, Lansford, responded that in the period specified [9] it broadcast no local news programming devoted to West Hazleton, but would do so on the basis of interest to its listeners. Its source of local information regarding West Hazleton would be the Pennsylvania State Police, Hazleton Barracks and the hospitals serving the area. Aside from school closings, no substantive coverage to West Hazleton is afforded by WLSH.

23. *WNAK*, Nanticoke, responded that news and sports coverage by it of the West Hazleton area was minimal, but they do have some public service announcements from West Hazleton, WNAK, because of terrain difficulties, does not consider West Hazleton in its primary coverage area.

24. *WAVT–FM*, Pottsville, responded that less than 1% of its news broadcasts concerned West Hazleton and that it broadcast such news items only if they were of interest to Pottsville residents. Sources of news information concerning West Hazleton include A.P. wire service, newspapers, state and local police. WAVT–FM broadcasts information on driving conditions relative to Interstate Route 81 near the Hazleton area.

25. *WYZZ–FM*, Wilkes-Barre, responded that the principal communities to which service is directed includes Hazleton. WYZZ–FM has "line-of-sight" into Hazleton and West Hazleton. About 1% of WYZZ's news during the relevant period [10] defined by the interrogatories was devoted to local news of West Hazleton. News coverage is based upon whether the news will contribute to the economic, social, spiritual, or cultural needs of these smaller communities and also benefit the whole region. WYZZ has both advertisers and listeners in West Hazleton who contact WYZZ when they have something of interest to promote; no local news gathering facilities are maintained by WYZZ in West Hazleton.

26. WYZZ broadcasts news and public service announcements for West Hazleton. However, in WYZZ's opinion, the economic, cultural, social news of West Hazleton is so strongly integrated into the Greater Hazleton Area that any attempt to segregate West Hazleton from Hazleton is divisive and a contradiction to the consolidation efforts being made. Among the public service announcements broadcast by WYZZ concerning the Greater Hazleton Area in the seven days [11]

[8] January, 1970 to June, 1970.
[9] May 1, 1970 to June 29, 1970.
[10] May 1, 1970 to July 21, 1970.
[11] June 16, 1970 to June 23, 1970.

preceding receipt of interrogatories were: Hazleton Lodge #887, B'nai B'rith; Freeland Institute, formerly a mining institute but, actually, a secondary school; Philharmonic Society of Hazleton Annual Spring Concert; Greater Hazleton Fine Arts Council and the Pennsylvania Ballet; Hazleton Area Antique Auto Club; and Father Ferrara's Fernwood Music Camp. Father Ferrara, through the Hazleton Philharmonic Society, conducts a program with some 3,000 school children. He also conducts a summer music camp. WYZZ does not broadcast religious services from West Hazleton.

27. In December 1969, WYZZ sent a crew to Hazleton to tape the Christmas performance of Father Ferrara's Group Orchestra (students and adults) and broadcast it on Sunday afternoon prior to Christmas. In May 1970, WYZZ taped and broadcast the Annual Spring Concert of the Hazleton Philharmonic Society. Residents of West Hazleton, Hazleton, Freeland, and the Greater Hazleton Area participated in these programs. WYZZ broadcast announcements five to ten times daily giving information as to time, cost, etc. WYZZ also broadcasts general information as supplied by all of the schools. No editorials of a local nature concerning West Hazleton were broadcast in the time period specified by the interrogatories. (January 1970 to June 1970.)

28. WYZZ carried paid political broadcasts for one candidate running for a magistrate's position in the West Hazleton district. WYZZ broadcasts, via local origination from the Hazleton area, the Hazleton Philharmonic Society, which includes the people of West Hazleton. WYZZ gives weather information for Hazleton and believes that the same information applies to West Hazleton since "West Hazleton is Hazleton." WYZZ weather is broadcast on the half-hour and hour throughout the day. WYZZ has local advertisers in West Hazleton. WYZZ broadcasts local talent from West Hazleton.

29. *WAZL, WVCD (FM)*, Hazleton responded that it principally serves, *inter alia*, West Hazleton and Hazleton. During January and February 1972, WAZL broadcast 552 local news stories prepared by the WAZL news department. WAZL's Answers to Interrogatories were completed during the period the hearing was held—January–March 1972. The other stations responded approximately 18 months earlier. Approximately 5% of these were directed specifically to activities and/or events taking place exclusively within West Hazleton. An additional 25% of the local news covered activities and/or events of interest not only to West Hazleton, but also to the contiguous communities of Hazleton and Hazle Township. These broadcasts included coverage of the Hazleton Area School District, the Hazleton Area Sewer Authority, the Lower Luzerne County Solid Waste Management Authority, the Lower Luzerne County Reclamation and Recreations Association, and the Hazleton City Water Authority. Similarly, WAZL broadcast coverage of the activities of the three local hospitals (all in Hazleton) and the two state police barracks located in Hazleton and West Hazleton. WAZL does not employ any special criteria for determining whether local news of West Hazleton is to be included in its local news broadcast. This is because of the general identity of commercial, economic and civic interest shared by the contiguous communities of Hazleton, West Hazleton and Hazle Township. As a result,

news of a public event in West Hazleton would generally be newsworthy. WAZL obtains local news of West Hazleton by regular contact with the local hospitals, the state police units in the area, and the West Hazleton police and fire departments.

30. WAZL covers all regular and special meetings of the West Hazleton Borough Council and tapes these meetings for rebroadcast in news excerpts. WAZL coverage of West Hazleton news in January–February, 1972, included live reports from the mayor, members of the West Hazleton Council, the West Hazleton Streets Department Foreman and the West Hazleton Police Chief regarding a snow storm. WAZL covers fires on the scene in West Hazleton. WAZL's sources for local news include communications with governmental officials. WAZL provides election returns coverage for West Hazleton. WAZL does not maintain news gathering facilities in West Hazleton. WAZL does broadcast regularly public service announcements for West Hazleton groups and organizations. Between January 6 and January 13, 1972, WAZL broadcast a minimum of 32 public service announcements for West Hazleton groups, and a total of 159 public service announcements for groups or organizations serving West Hazleton, Hazleton and Hazle Township. The public service announcements for West Hazleton groups were: West Hazleton Knights of Columbus; West Hazleton Police Department; West Hazleton Fire Department; West Hazleton Art Museum; All American Senior Citizens Group; West Hazleton Lions Club; and Society for the Preservation and Encouragement of Barber Shop Quartet Singing. These were broadcast during regularly scheduled public affairs programs.

31. WAZL, in cooperation with the Hazleton Ministerial Association, broadcasts a daily devotional program. The Hazleton Ministerial Association includes the ministers of West Hazleton. Since August 1971, three clergymen from West Hazleton churches were featured. The only two Jewish synagogues serving the Greater Hazleton Area (both in Hazleton) were each featured during this time. WAZL regularly broadcasts public affairs programming highlighting matters of general educational interest to the Greater Hazleton Area, which has a consolidated school district. Examples of this programming include: twice daily five-minute discussions by local educators broadcast during American Education Week; a 25-minute program on the activities at the High Acres Campus of Penn State University; a 25-minute program on the new co-educational programs available to the Greater Hazleton Area at the Freeland Mining and Mechanical Institute; and a 25-minute program on the education programs available to the Greater Hazleton Area at the Luzerne County Community College at Wilkes-Barre. Additionally, news of school closings is broadcast.

32. WAZL initiates public affairs programming which specifically pertains to West Hazleton. Since July 1971, WAZL has broadcast four such programs: "Local Government in West Hazleton" with Leo Kulitsky, Mayor of West Hazleton; "Solid Waste Management and How it Affects West Hazleton" with William Butler, Chairman of the Solid Waste Management Commission: "Joint Sewer Authority, How It Works for West Hazleton, Hazleton, and Hazle Township" with Oscar Thomas, Chairman of the Greater Hazleton Joint Sewer Authority; and "Future Effects of Hazleton Area School Board Deci-

sions on West Hazleton and the Over-all Area", with James Capparell, President of the Hazleton Area School Board and West Hazleton Representative. Other public affairs programs broadcast since July, 1971 of general interest to West Hazleton and the Greater Hazleton Area included: "Crime in Luzerne County"; "Labor Day Safety on Greater Hazleton Highways"; "Community Concert Association (Greater Hazleton)"; "Activities of the Industrial Management Group of Valmont Industrial Park"; Area Chapter of the American Association of University Women"; "Social Security Administration Services to the Greater Hazleton Area"; "Greater Hazleton Services of the Pennsylvania State Bureau of Employment Security"; "Consumer Protection"; "Navy Day Observance in the Greater Hazleton Area"; "Community College Programs Available to the Area"; "Girl Scout Activities in Greater Hazleton Area"; "Greater Hazleton United Fund Drive"; "United States Post Office Activities in Greater Hazleton Area"; "Community Involvement in Education"; "Regional Highway Safety Over Christmas Holiday"; "Greater Hazleton Chamber of Commerce Activities"; "Services Rendered to the Greater Hazleton Area by Radio Stations WAZL and WVCD"; and "Services Provided the Greater Hazleton Area by the Greater Hazleton United Fund".

33. Additionally, WAZL provides live coverage of the guest speakers at the Kiwanis Club's weekly meetings. WAZL does not editorialize regularly, but has, on occasion, editorialized on matters of direct interest to West Hazleton. WAZL carries paid political announcements for West Hazleton candidates. WAZL broadcast live several of the home and "away" football games of West Hazleton High School. Similarly, WAZL broadcast live basketball games of West Hazleton High School. WAZL does not broadcast any local originations, but has broadcast remote from the premises of two of its West Hazleton advertising clients. WAZL broadcasts all plant closings in the Greater Hazleton Area, which would include Valmont Industrial Park in West Hazleton and Hazle Township. Road condition reports specifically relating to West Hazleton are broadcast. In snow emergency, direct announcements from officials at the West Hazleton Borough Building are aired.

34. WAZL solicits advertising without distinction from West Hazleton and Hazle Township. WAZL has a four man sales staff which canvasses West Hazleton for new business. In the past year, 19 business establishments in West Hazleton broadcast advertisements on WAZL. WAZL does not anticipate ever deriving more than 10% of its total advertising revenues from West Hazleton. WAZL does not regularly broadcast local talent from West Hazleton, or from any of its primary service area. On special events, as requested, WAZL may broadcast local events which utilize local talent. WAZL has a telephone dialogue program daily which includes the award of small prizes daily. In a recent week, six West Hazleton residents were awarded prizes.

35. In addition to the interrogatories received from the AM and FM stations placing a 2 mv/m or 1 mv/m contour over West Hazleton, the applicant included portions of the programming sections of each station's last renewal application. These are, of course, general statements not specifically addressed, as were the interrogatories, to the

extent of service given to West Hazleton. For this reason, no meaningful findings can be made on the contents of those sections with respect to the question of the extent to which the needs of the West Hazleton area are being met by existing broadcast facilities. An exception is made with respect to WAZL since the Bureau introduced as an exhibit the remaining portions of WAZL's application which specifically described its local programs.

36. The applicant's witness, J. J. McCluskey, testified that the existing broadcast facilities were not meeting the needs set forth in Broadcasters 7 Exh. 1. McClusky specifically stated that "the present broadcasters . . . . candidly admit that they don't cover the West Hazleton council meetings whereas they cover the Hazleton council meetings . . . . the day-to-day governmental operations are completely ignored presently, as is (sic), for lack of a better word, the 'gripes of the public' . . . . almost all of the public programs on the present facilities are oriented to the city of Hazleton to the exclusion of the other municipalities in the area . . . for a long time the present facilities invited the officials from the city of Hazleton, that city's officials to participate, I think once a week on Wednesday, I am sure of that, but to my knowledge there was no similar invitation to West Hazleton or any of the areas outlying West Hazleton."

37. Although McCluskey characterized himself as a consistent listener of WAZL, it was established that he listened to WAZL only on his way to work in the morning, sometimes on his way to court, but not while he was working during the day or in the evening. Despite his limited listening to WAZL, McCluskey testified that, as a general rule, outlying areas did not receive news coverage from WAZL and that he believed that Hazle Township received more coverage, comparatively, than West Hazleton. McCluskey stated that he listened to the stations which responded to the interrogatories, identified *supra* at paragraph 19. However, he stated that he "very rarely turn[ed] on the radio, it is usually my wife who turns on the radio in the car." If a radio is on in McCluskey's home, it could be turned to any of the stations.

38. *The extent to which the applicant's program proposal will meet the specified unsatisfied needs of the specified station location.* In attempting to meet this element of the Suburban Community issue, the applicant relied upon the opinion of the principals based on the surveys taken and the result of other data acquired in determining what specific program needs were unsatisfied. However, no monitoring or other effort, aside from the interrogatories, was made to ascertain if specific needs were indeed not being satisfied by the existing programming of stations serving West Hazleton. In McCluskey's view the needs that were not being met in the Borough of West Hazleton were essentially those involved with the manner in which the government was being operated. Therefore, the applicant's proposed programming was planned to get school officials, school teachers, municipal officials and other persons interested in community affairs to participate in the programs.

39. With respect to the specific programs proposed by the applicants, McCluskey testified that the "news" program would remedy the existing lack of coverage of West Hazleton's government on a day-to-

day basis, the lack of coverage of the formal meetings of the West Hazleton Borough Council and of the Caucuses of the West Hazleton Borough Council and the lack of coverage of the West Hazleton Police and Fire Departments. However, as specifically outlined at paragraph 29, *supra*, WAZL does provide coverage in these areas. While the applicant proposes that 33% of its news will be devoted to local and regional items, WAZL devoted 54.3% of its news to local and regional news during the composite week filed with WAZL's last renewal application, April 30, 1969. WAZL recently filed its renewal application (BR–815, official notice requested); its 1971 composite week showed that 33⅓% of its news was local or regional. Broadcasters 7 proposes 12.5% of its total programming will be devoted to news, whereas WAZL devoted 16.1% to news.

40. The applicant proposes a program, "Your Government," which will feature local government leaders from West Hazleton and surrounding communities. However, none of the governmental officials have been contacted by the applicant to see if they would appear, i.e., no verification has been shown. Nor has the applicant shown that this program will meet an unsatisfied specified need of West Hazleton. Similarly, the applicant has not demonstrated that existing stations' programming, such as WAZL's "Mayor and Council" and "Focus" programs, does not meet these needs.

41. "Women's Day" is a program which will "feature discussion of various women's activities and topics of feminine interest by leaders of various women's social and civic organizations." It is proposed by the applicant to "meet the needs expressed by many contacted of more and improved recreational facilities for the young and also encompasses adult information on schools and classes available." Even disregarding the obvious fact that the format and purpose described for the program, i.e., "discussion of various women's activities and topics of feminine interest by leaders of various women's social and civic organizations," do not correlate with the specified unsatisfied needs listed, such as recreational facilities for youth and adult information on schools and classes available, McCluskey was unable to state specifically that any of the women he contacted identified recreational facilities for youth as an unsatisfied need. Further, he did not contact any of the leaders of the various women's social and civic organizations with respect to this program. He had contacted none of the youth. Under these circumstances, it cannot be found that the program proposed will meet even a specified need, much less meet an unsatisfied specified need. Moreover, when McCluskey was asked if he were familiar with a similar program. "Woman Corner," on WAZL, he stated that he was not.

42. The applicant's proposed program, "West Hazleton 1300 Club," would "feature young people of West Hazleton and surrounding areas to discuss those issues which are of importance and interest to them." This program would meet the "need *for youth* to communicate with and express itself [sic] to the community at large, particularly with the major problem expressed in the area of recreational requirements, concern with drug abuse, and pollution." In view of the applicant's admitted failure to contact the youth or students in the community, it is impossible to find that this proposed program has any relationship to a separate and distinct need "for youth." Not only is this relation-

ship not shown, the applicant further fails to demonstrate that this program would meet the specified unsatisfied needs of West Hazleton.

43. The applicant proposes two programs of a religious nature, "Daily Devotional" and "Church Service." Both programs are similar to existing programs on WAZL. No demonstration has been made that either or both of these programs meet the specified unsatisfied needs of West Hazleton.

44. "Public Interview" would "air various local and area public issues and controversial matters." The program would "meet expressed needs and interests in the areas of unemployment, schools and related problems; transportation; taxes; housing; and urban development." The applicant did not demonstrate that this program would meet specified unsatisfied needs. Indeed, WAZL broadcasts a program called "Speak Up," which has a similar format to the program proposed by the applicant.

45. "Farm Review" is proposed for the purpose of offering "information and discussion of technical farming and home gardening, particularly for the outlying rural populations around the Greater Hazleton Area." When asked to tie this program into the issue of specified unsatisfied needs, McCluskey answered "I don't believe I can answer that definitely. That is part of a well-rounded programming, and I don't know that any need in the city of West Hazleton would be covered by the 'Farm Review'."

46. The program "Bulletin Board" would be used to provide coverage through use of public service announcements "with regard to meetings and events about which West Hazleton residents would otherwise remain uninformed." McCluskey testified that "insufficient communication" was an unsatisfied problem in West Hazleton. However, this problem as such was not identified as a problem in the listing of needs compiled by the applicant. No other stations were contacted to ascertain whether they were presenting this information. WAZL, WYZZ, and WILK all responded in their interrogatories that they carried public service announcements for West Hazleton and the Greater Hazleton Area.

47. McCluskey testified that in designing the programs for the proposed stations, no effort was made to contact other stations or to get any programs from other stations in order to ascertain whether specific needs were unsatisfied by existing programs. Each of the proposed programs, "Editorial," "Public Safety," "Open End," "Schools and Education," "Our Town," "Beginners Journey," "Area Schools," "Civic Report," and "Job Opportunities" is unrelated to specific needs or has a similar counterpart on WAZL, and sometimes on other stations serving West Hazleton. At no point in his testimony did McCluskey demonstrate that any of these proposed programs would meet a specified unsatisfied need of West Hazleton, as required by this issue.

48. *The extent to which the projected sources of the applicant's advertising revenues within the specified station location are adequate to support its proposal.* In attempting to meet this issue, the applicant provided statistical information relating to West Hazleton, particularly that part of Valmont Industrial Park which was annexed by West Hazleton in 1960 and the testimony and report of a broadcast consultant. The applicant estimates that first year revenues will be

$80,000. *The 1967 U.S. Census of Business* (official notice taken) shows West Hazleton as having 95 retail establishments, and Hazleton as having 455 retail establishments. West Hazleton brought in $11.1 million and Hazleton brought in $67.2 million in sales. According to the *Editor and Publishers' Market Guide, 1972*, West Hazleton has 72 retail stores and estimates $14.8 million in retail sales in 1972. However, McCluskey testified that he knew of 12 retail businesses which had come to West Hazleton since 1967.[12]

49. McCluskey testified that Broadcasters 7 had no formal written commitments from advertisers, although they had informal commitments. But he did not have a breakdown or one name of a merchant who had even informally committed itself to purchase advertising time on the proposed station. While Broadcasters 7 will rely on the various retail establishments in the community, McCluskey did not know of any industries in the West Hazleton segment of Valmont Industrial Park which have placed or purchased any ads locally. He stated that Broadcasters 7 had no firm commitments for advertisers in Valmont Industrial Park. When asked if he know of any advertisers who aimed at reaching West Hazleton audiences specifically, McCluskey said that the shopping center at Valmont Industrial Park attempted to reach such audiences. These advertisers now use the local Hazleton newspaper and the Hazleton radio station. There is no positive indication that such advertisers would switch to the proposed station, especially in light of its physical location on the farther side of Hazleton. Nor was there any indication that existing advertisers would increase their advertising budget, or split them in order to place ads on the proposed facility.

50. The applicant's broadcast consultant, Paul B. Mowrey, testified with respect to the extent to which the projected sources of the applicant's advertising revenues within West Hazleton would be adequate to support its proposal. Mowrey concluded that the proposed station at West Hazleton could realize in excess of $80,000 in revenues. In reaching this conclusion, Mowrey first used the most recent FCC report on AM–FM revenues for 1970 in conjunction with the population of West Hazleton. He found that the average gross revenues in that category of population was $106,000. Mowrey's second "cooperating theory" was to take a community in the same area which had radio stations in it (Wilkes-Barre), average the total revenues reported for all stations in Wilkes-Barre by the total population of the Wilkes-Barre area, and to use that figure as the average amount an advertiser would spend per year per individual in the population. Using the second formula, Mowrey came up with a revenue figure for West Hazleton of $73,854, which he then compared with the FCC report on AM–FM revenue figures, and concluded that $80,000 in revenues was a fair estimate.

51. Mowrey further testified, on the one hand, that because of West Hazleton's geographical location it would be *impossible* to generate any national sales because of the Wilkes-Barre TV stations and also that little regional sales could be anticipated. On the other hand,

[12] Dunking Donuts, Justofin's Pharmacy, Carroll's, Verrastro Beer Distributor, Burger Chef, Pizza Hut, Gallagher's Plumbing Supply, McGeehan's Auto Body, Michael Pecora, realtor, Amoco Service Station, Hazle Park Packing, and Pantry-Quik.

Mowrey testified that the fact that West Hazleton was within the Wilkes-Barre SMSA would give more revenues to the West Hazleton station. The Bureau submits that this is an inconsistent conclusion if the West Hazleton station would be relying totally, or almost so, on *local* revenues. Mowrey had no information as to whether WAZL, Hazleton, had regional or national sales.

52. The consultant's analysis reveals several other important deficiencies which nullify the over-all conclusion he reached. Mowrey testified that he gave no consideration to the fact that West Hazleton is geographically contiguous to Hazleton, or to the competitive situation created by the fact that WAZL, Hazleton's station, places a primary signal over West Hazleton. Further, he relied on West Hazleton being a single station market, which, practically speaking, it is not. Additionally, Mowrey did not know whether the FCC figures reflected revenues in a non-competitive single station market. Mowrey relied primarily upon his "vast experience" in concluding that West Hazleton could produce $80,000 in revenues. However, since the underlying premises upon which the Mowrey conclusion is predicated were not consistent and were without relationship to the factual situation viz-a-viz West Hazleton, his conclusions must be rejected.

53. Under the Review Board's Order, *supra*, the applicant was given the opportunity, should it not be able to demonstrate that its proposal would realistically provide a local transmission service to West Hazleton, to demonstrate that it met all of the technical provisions of the rules for the standard broadcast stations assigned to Hazleton. As discussed in paragraph 10, *supra*, the applicant's engineering proposal causes objectionable interference with co-channel Station WFBR, Baltimore, Maryland. Under Section 73.37 of the Rules, the prohibited overlap of the proposed 0.5 mv/m contour and the WFBR 0.5 mv/m contour would prevent the application being accepted for filing if it were specified as a Hazleton station. Thus, the applicant could not fulfill the technical requirements for a Hazleton station.

CONCLUSIONS

1. Broadcasters 7, Inc. proposes to operate a new Class III standard broadcast station, daytime only, in West Hazleton, Pennsylvania, on 1300 kHz with a power of 5 kilowatts, directionalized.

2. West Hazleton, population 6,059, adjoins the northwest corner of Hazleton, Pennsylvania. Both communities are located in Luzerne County (pop. 342, 301), which comprises the Wilkes-Barre-Hazleton Standard Metropolitan Statistical Area. West Hazleton has no AM, FM or TV stations and no FM or TV channels allocated thereto. Hazleton has one Class IV AM station (WAZL), one Class B FM station (WVCD), and no TV stations. UHF television Channel 56 is allocated to Hazleton.

3. Broadcasters 7 proposed to use the same directional facilities once used by defunct Station WHZN, Hazleton, Pennsylvania (1300 kHz, 1 Kw, DA–D) but with a different power and directional antenna pattern. The site is situated 1.5 miles east southeast of the center of Hazleton just outside the city limits and 2.15 miles southeast of the closest city limits of West Hazleton. Maximum radiation is proposed

toward the two communities with Hazleton receiving the stronger signal. The proposed 25 mv/m contour covers all of Hazleton and some 85% of West Hazleton and the proposed 5.0 mv/m contour covers all of both communities. The engineering characteristics of a particular proposal affect the quantum of proof necessary to rebut the presumption. When, as here, the engineering characteristics convincingly establish that the proposal is, in effect, one for Hazleton, the proof to rebut the presumption must be of a most persuasive nature. *Kittyhawk Broadcasting Corporation*, 20 FCC 2d, 1011, 1014 and *Lebanon Valley*, cited, *infra*. Thus, the proposal would technically qualify as a Hazleton station with respect to Section 73.188 of the Rules. However, as noted in the findings, such an application would not be acceptable for filing under Section 73.37 of the Rules in that it would provide a second AM outlet to Hazleton and would involve prohibitive overlap with Station WFBR.

4. The proposed station will provide primary service to 127,995 persons in 1,080 square miles of which 44,595 persons reside in the urban communities of West Hazleton, Hazleton, Freeland and McAdoo, Pennsylvania. Five AM stations serve all the communities, except McAdoo which is served by two. In addition, four FM stations serve all four communities so that five daytime aural services are available to each. Three AM stations serve all of the rural areas proposed to be served, six serve portions and from five to eight serve any one portion.

5. In view of the foregoing engineering facts, "a presumption will arise that the applicant realistically proposes to serve the larger community rather than his specified community." *Policy Statement on Section 307(b)*, 2 FCC 2d 190 at 193. See also *VBW, Inc.*, 8 FCC 2d 744, *Madison Broadcasting, Inc.*, 8 FCC 2d 752, *Babcom, Inc.*, 12 FCC 2d 306, and *Outer Banks Radio, Inc.*, 15 FCC 2d 944. Moreover, the fact that the applicant could not apply for a facility in Hazleton because its proposal would be in violation of Section 73.37 of the Rules (prohibited overlap) supports this conclusion. Thus, the applicant must come forward to rebut the presumption that it is a Hazleton proposal. For the reasons discussed fully, *infra*, it must be concluded that the applicant has not rebutted this presumption.

6. In order to rebut this presumption, the applicant is required, *inter alia*, to demonstrate that West Hazleton has separate and distinct needs which are not presently being adequately met and which, in a significant manner, will be served by the applicant's program proposal. Before dealing with specific areas delineated, consideration must be given to the general characteristics of the community including the independence or interdependence of its people, organizations, and businesses relative to the larger community. The facts establish that while West Hazleton has an independent municipal government, most of what are ordinarily considered governmental activities—education, water, sewage treatment, public library—are either carried on jointly with Hazleton or by Hazleton alone. The facts also establish a significant degree of coordination of civic, social, and cultural activities within the Hazleton-West Hazleton area. For example, the Greater Hazleton Chamber of Commerce, the Greater Hazleton Ministerial Association, CAN-DO (an urban redevelopment agency), the Greater

Hazleton United Fund, the Rotarians, the Kiwanis Club, the Hazleton Hospitals, and the Hazleton Fine Arts Council are all organizations which serve Hazleton and West Hazleton, and who draw members or serve persons from West Hazleton.

7. Further, the survey of Broadcasters 7 to ascertain the existence of separate and distinct needs of West Hazleton developed that nine of eleven problems identified by the applicants were the same ones which had been identified for Hazleton. The existence of two separate needs does not establish that the contiguous community of West Hazleton has separate and distinct program needs from Hazleton, as contemplated by the Commission's *Policy Statement on Section 307(b)*, *supra*. The facts, to the contrary, establish that West Hazleton does not have such needs. See *Goodman Broadcasting Co.*, 10 FCC 2d 141. Even Broadcasters 7 recognized this, for they then attempted to establish the existence of distinct and separate problems by comparing the percentage of persons in Hazleton who identified a given problem with the percentage of persons in West Hazleton who identified a given problem. They then, in effect, ranked the problems priority-wise by the percentage of people who had identified them. However, this type of comparison fails to meet the issue since the question goes to the existence, if any, of separate and distinct program needs rather than the degree of difference between respondents concerning the same or similar problems. Moreover, even if this type of comparison were responsive to the issue, the statistical methodology used by the applicant does not provide a valid basis for the use to which it is made. For example, although Hazleton is five times larger than West Hazleton, the number of persons contacted in West Hazleton was twice those contacted in Hazleton. This created a weighted preference, percentage-wise, for West Hazleton responses. A statistical sampling representative on a proportional basis of the comparative populations of Hazleton and West Hazleton would require that five times as many Hazleton residents be contacted as West Hazleton. The significance of the applicant's efforts to ascertain separate and distinct program needs of West Hazleton viz-a-viz Hazleton is in the fact that of the eleven needs identified by the applicants for West Hazleton, nine were the same as those needs identified by the applicants for Hazleton. This clearly demonstrates the homogeneous nature of the two communities and the applicant's failure to identify significant separate and distinct program needs. It is, therefore, concluded that the applicant has not met this aspect of the issue.

8. The second element of the rebuttal requires a showing with respect to the extent which needs of West Hazleton are being met by existing standard broadcast facilities. Under this aspect of the issue, interrogatories were sent by the parties to both AM and FM stations placing a 2 mv/m or 1 mv/m, respectively, contour over West Hazleton. Responses to these interrogatories establish, in large part, the prevailing view that West Hazleton is part of Hazleton or the Greater Hazleton Area and, as such, is served when that area is served. Three stations, WAZI, Hazleton, WYZZ, Wilkes-Barre, and WILK, Wilkes-Barre, stated in their responses that they provide various degrees of service to West Hazleton and obtain advertising revenues therefrom. Since no separate and distinct program needs have been established for

West Hazleton, the extent to which existing facilities are meeting these needs cannot be established. However, the findings establish, and it is concluded, that news, public service announcements and advertising from West Hazleton are carried by all. WAZL, Hazleton, specified a number of programs particularly dealing with West Hazleton, including coverage of borough council meetings. Although Mr. McCluskey testified that WAZL did not cover West Hazleton borough meetings and other day-to-day governmental activities, the record establishes, and it is concluded, that WAZL does cover such events and activities. Further, the record establishes that Mr. McCluskey does not listen to the radio much and also is not a resident of West Hazleton. The two latter facts may account for his lack of knowledge concerning the coverage West Hazleton receives not only from WAZL but also from the other stations rendering a primary service to West Hazleton. In summary, the applicant has not demonstrated, one, that West Hazleton has separate and distinct needs and, two, assuming West Hazleton did have those needs, that existing stations are not meeting these needs. Therefore, it must be concluded that the applicant has not met Issue 1–b.

9. The cases cited, *supra*, require that if it is concluded West Hazleton has separate and distinct program needs from Hazleton, and that these needs are not met by existing stations, the applicant must then demonstrate that its program proposal is designed to meet these separate unsatisfied specified needs of West Hazleton. The findings detail the applicant's proposed programs, the method by which the applicant determined that these programs would meet unsatisfied specified needs of West Hazleton, and the method by which it determined the existence of other programming serving West Hazleton. The findings demonstrate clearly, and it is concluded, that the applicant made no effort, other than the interrogatories, to ascertain whether any of the programs it was proposing actually met unsatisfied specified needs. In Mr. McCluskey's words, any need that a person identified in response to the survey questions as to the needs of the community was interpreted by the applicant to mean that that was an unserved program need. Further, the programming proposed has little relationship to the problems identified. Additionally, no one has been contacted to appear on any of the proposed programs. Finally, with the possible exception of two or three programs (out of 18 proposed), all of the proposed programs are extremely similar in format to the programs on WAZL, Hazleton. The added failure to demonstrate that the proposed programming will meet unsatisfied specified needs fortifies the conclusions reached *supra* that the application must be denied. However, even if Issues (1) (a) and (b) had been met, the failure of the applicant to meet Issue (1) (c), standing alone, requires a denial of its application. See *American Homes Station, Inc.* (WVCF), 8 FCC 2d 430 (Initial Decision), and *Goodman Broadcasting, Inc., supra*. The Review Board has emphasized that an applicant is required to "translate by meaningful, concrete evidence the differing community characteristics into differing programming needs." See also *Monroeville Broadcasting Company, et al., 12 FCC 2d 395, Lebanon Valley, cited, supra*. The applicant has totally failed to do this.

10. The Commission's *Suburban Policy Statement* (2 FCC 2d 190 at para. 10) provides in pertinent part: ". . . although it would not necessarily be determinative, such an applicant would be expected to adduce evidence as to whether the projected source of advertising revenues within his specified community are adequate to support his proposal as compared with the source from all other areas. . . ."

11. Broadcasters 7 estimates its revenue will be $80,000 the first year. No breakdown or source of revenue from West Hazleton, Hazleton, or other areas was submitted. The applicant's expert witness, Mowrey, testified that the majority of the revenues would come from local sources, discounting both national and regional advertising. Mowrey concluded that the applicant could reasonably expect to receive in excess of $80,000 in revenues the first year. However, the expert, in coming to this conclusion, bases his figures in part on the 1970 FCC Report on AM–FM Revenues for communities the size of West Hazleton. Although Mowrey was aware that West Hazleton was contiguous to the larger community of Hazleton and that Hazleton had a radio station which placed a primary signal over West Hazleton, he treated West Hazleton as a single station market in estimating revenues using the FCC AM–FM Revenues Report figures. Then Mowrey averaged the total revenues reported for all stations in another larger market (Wilkes-Barre), which figure he compared with the sum shown in the FCC Report, *supra*, and thereby reached his conclusion that West Hazleton could generate $80,000 in revenues for the proposed facility. These are invalid bases for producing a viable estimate; rather, it is akin to comparing apples and oranges. The formula used by the witness must be viewed as contradictory and at variance with the factual circumstances surrounding this application. No weight, therefore, can be given to his conclusions.

12. Further, the applicant has no formal commitments for advertising. Mr. McCluskey had no knowledge that any of the industries in Valmont Industrial Park (West Hazleton's main industries) now advertise and, to the extent that businesses in West Hazleton do advertise, Mr. McCluskey stated that they used the existing broadcast facilities and the local newspaper. Finally, there was no showing whatsoever that existing West Hazleton advertisers, to the extent there are any, would advertise on a West Hazleton station, particularly one whose studios are located on the other side of Hazleton, or that anyone is or would be interested in reaching West Hazleton residents rather than the "Greater Hazleton Area" residents. Therefore, even though the findings and conclusions under Issue (1)(d) may not necessarily be decisional, they must nevertheless be decided adversely to the applicant and support the over-all conclusion on the other issues that the application of Broadcasters 7 must be denied. This is true particularly in light of (1) the foregoing facts that the applicant would provide 100% 25 mv/m coverage to Hazleton; while its proposed facilities would provide such coverage to only 85% of West Hazleton; (2) the demographic facts (its dependence on and interdependence with Hazleton); (3) its failure to establish the existence of separate and distinct program needs; (4) its failure to identify program needs unmet by existing facilities; and (5) its

failure to demonstrate that its proposed programming would meet unsatisfied specified needs.

13. In view of the foregoing, it must be concluded that Broadcasters 7 has failed to rebut the presumption that it would, in fact, be a Hazleton outlet. Since it cannot comply as a fully qualified applicant for Hazleton under the alternate issue, its proposal must be considered a substandard Hazleton proposal and, as such, must be denied.

Accordingly, IT IS ORDERED, that unless an appeal from this Initial Decision is taken by a party to the proceeding, or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Broadcasters 7, Inc. for a construction permit for a standard broadcast station to operate on 1300 kHz with five kilowatts power, daytime only, utilizing a directional antenna, in West Hazleton, Pennsylvania IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
CHARLES J. FREDERICK, *Hearing Examiner.*

FCC 74R–143

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CAPITOL BROADCASTING CORP. (WCAW), CHARLESTON, W. VA. For Construction Permit	Docket No. 19580 File No. BP–18309

APPEARANCES

Donald E. Ward and *Arthur G. House*, on behalf of Capitol Broadcasting Corporation; *William P. Bernton*, *E. Theodore Mallyck* and *Jeffrey W. Malickson*, on behalf of Chemical City Broadcasting Company; and *Joseph Chachkin*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted April 17, 1974; Released April 22, 1974)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK AND KESSLER.

1. This proceeding involves the application of Capitol Broadcasting Corporation (Capitol), the licensee of standard broadcast Station WCAW, Charleston, West Virginia, to increase its daytime power from 10 kw to 50 kw utilizing a directional antenna. By Memorandum Opinion and Order, FCC 72–766, released September 7, 1972, the Commission designated Capitol's application for hearing on the following issues:

> 1. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of Station WCAW and the availability of other primary aural (1 mv/m or greater in the case of FM) service to such areas and populations.
>
> 2. To determine whether the proposed operation is in compliance with Section 73.24(g) of the Commission's rules concerning population within the 1 mv/m contour and, if not, whether circumstances exist which would warrant a waiver of said section.
>
> 3. To determine in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

Additionally, Chemical City Broadcasting Company (Chemical), the licensee of Station WTIP, Charleston, West Virginia, was made a party to this proceeding by the Commission in its designation Order.[1]

2. In an Initial Decision, FCC 73D–47, released August 24, 1973, Administrative Law Judge Chester F. Naumowicz, Jr., concluded that a waiver of Rule 73.24(g) was warranted and, accordingly, that a

[1] Chemical had filed a petition to deny Capitol's application, alleging, *inter alia*, that the data filed by Capitol regarding the population within Capitol's proposed 1 v/m contour was inaccurate and that cross-modulation problems presently exist which would be aggravated by an increase in WCAW's power.

grant of Capitol's application would serve the public interest, convenience and necessity. Exceptions, a brief in support thereof, and a request for oral argument were filed by Chemical; limited exceptions and a request for oral argument were filed by Capitol; and a reply was filed by Capitol. We have reviewed the Initial Decision in light of the exceptions and brief, the arguments of the parties [2] and our examination of the record. The Presiding Judge's findings of fact are substantially accurate and complete, and his mediate, as well as his ultimate, conclusions are supported and warranted by the findings. Therefore, except as modified herein and in the rulings on exceptions contained in the attached Appendix, the Initial Decision is adopted. However, in light of the arguments of the parties, both in their exceptions and at oral argument, we believe that some brief amplification is warranted.[3]

3. It is undisputed that Capitol's proposal is in violation of Rule 73.24(g), since WCAW's proposed 1 v/m contour encompasses a total of 4,852 persons or 2.83% of the 162,114 persons residing within WCAW's projected 25 mv/m contour.[4] The parties do, however, disagree as to the extent and intensity of external cross-modulation interference with the WTIP signal [5] and, consequently, as to the significance of this interference with regard to waiver of Rule 73.24(g). The Review Board has, however, analyzed the record showings of Capitol and Chemical and finds that Capitol's showing has both adequately and persuasively rebutted that of Chemical's, and that the degree of cross-modulation interference is *de minimis*. Chemical conducted listening tests in the general area of WCAW's transmitter and detected cross-modulation at five outdoor locations. However, when Capitol's consulting engineer made subsequent listening tests, encompassing the entire area in which tests were conducted by Chemical, cross-modulation was detected at two locations only. Significantly, the instances of cross-modulation disappeared with a move of several feet. Chemical's engineer conducted further listening tests during which he reportedly detected interference at locations in front of 21 residences; however, in a corroborative telephone survey of these residences by Capitol, thirty-seven responses were obtained of which thirty-two indicated no difficulty in listening to any of Charleston's radio stations, and of the five responses which indicated some difficulty, only two re-

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[2] Oral argument was held before a panel of the Review Board on March 5, 1974.

[3] No exceptions were made to the findings or conclusions drawn under the designated areas and populations issue. As a consequence, the facts adduced pursuant to this issue will be set forth only insofar as they are relevant to the Rule 73.24(g) issue.

[4] Rule 73.24(g) provides that the population within the 1 v/m contour may not exceed 1.0 percent of the population within the 25 mv/m contour, but that if the population within the 1 v/m contour is 300 or less the provisions of the Rule are not applicable.

[5] There is no allegation of other types of interference or interference to other stations. External cross-modulation is the term applied to spurious frequencies generated by nonlinear ("poor") contacts in wiring or metallic piping located in areas of strong signal strengths. In addition to external cross-modulation, two other types of interference may result from very strong radio signals: (1) blanketing, which occurs when the strong signal in the vicinity of a transmitter site overloads the input circuits of a radio receiver, and (2) internal cross-modulation, which occurs when two strong signals of different frequencies present in a receiver circuit interact or when the strong signal of one station enters the transmitter circuits of another station resulting in the radiation of spurious signals in addition to the main signal. See *WHOO Radio, Inc.* (*WHOO*), 4 FCC 2d 437, 8 RR 2d 83 (1966).

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ferred to WTIP.[6] Finally, the parties stipulated to the results of a survey of the houses within WCAW's proposed 1 v/m contour (as depicted by WTIP); 540 forms were completed and returned of which 510 reported no difficulty in receiving Charleston radio stations, thirteen mentioned difficulty in receiving WTIP, although WCAW was not specifically mentioned as the reason for the difficulty, and the other complaints were varied and unrelated in nature, *e.g.*, weak signal, station off the air, etc.

4. In addition to the above, the Board is of the view that there are other factors which further militate against concluding either that the present operation of WCAW causes sufficient cross-modulation interference to adversely affect the residents within the WCAW 1 v/m contour, or that Capitol's proposal, if granted, would appreciably intensify any existing interference. As an initial matter, it should be noted that some of the alleged points of interference specified by Chemical must be discounted entirely, since they are located outside of WCAW's proposed 1 v/m contour as depicted by both Chemical and Capitol. Second, external cross-modulation, which is the only kind of interference alleged, usually occurs because of faulty wiring or plumbing and as a result can normally be eliminated or attenuated by proper grounding or corrective wiring.[7] Third, none of the cross-modulation detected by Chemical or Capitol occurred inside dwellings, but rather under or near overhead wires and, significantly, the interference disappeared with a slight change in position (which would be accomplished quickly by a vehicle moving at normal speed). Fourth, the bulk of the population living within the proposed 1 v/m contour has voiced no complaint about reception problems and those who have experienced such difficulties did not cite WCAW as the cause of such interference; this lack of complaints about WCAW is, in the Board's view, strong evidence that cross-modulation interference does not now exist. See *Swanco Broadcasting, Inc.*, 35 FCC 2d 345, 24 RR 2d 569 (1972), affirmed 27 RR 2d 430. Fifth, Capitol has agreed to resolve any interference problems which may result from its power increase. In sum, it is our view that Capitol has clearly and satisfactorily demonstrated that a waiver of Rule 73.24(g) would be in the public interest. *WHOO Radio, Inc.* (*WHOO*), *supra;* and *Georgia Radio, Inc.*, 16 FCC 2d 909, 15 RR 2d 999 (1969). Thus, the applicant has shown that the population within WCAW's proposed 1 v/m contour is relatively small, *i.e.*, 2.83% of the population within its proposed 25 mv/m contour; radio reception within the proposed 1 v/m contour will be virtually unaffected by the presence of WCAW's signal; and, the proposal would result in definite public interest benefits since over 1,000 persons would receive a first aural service, over 4,000 would receive a second aural service and over 11,000 would receive a third aural service.

[6] One stated that WTIP had gone off the air on January 7 and the other mentioned static. Chemical argues, however, that since none of the respondents were asked if they ever listened to WTIP, the survey is somehow inadequate. Chemical's allegations in this regard are unsupported and must be rejected as surmise. Thus, Chemical made no attempt to controvert the results of Capitol's survey, either during cross-examination or by a similar survey method.

[7] In this connection, it is noted that the telephone and power companies have agreed to assist Capitol should external cross-modulation develop.

5. Since Capitol has effectively demonstrated that the population within its proposed 1 v/m contour would not be subject to appreciable objectionable external cross-modulation and that the public interest would be served by a grant of its application, the necessity for an alternative site showing by Capitol is, in our view, obviated.[8] *Cf. WHOO Radio, Inc.* (*WHOO*), *supra*. In this regard, Chemical's reliance upon *Georgia Radio, Inc., supra*, for the proposition that Capitol is required to make an alternate site showing regardless of the amount of interference shown, is misplaced. In *Georgia Radio*, the Board faulted the applicant for its failure to demonstrate the availability of an alternate site under circumstances in which a significant proportion of the population within the applicant's proposed 25 mv/m contour resided within the proposed 1 v/m contour, *i.e.*, 9.6%, and a substantial amount of blanketing occurred in the station's present operation. In contrast, where a relatively small proportion of the population within WCAW's 25 mv/m contour resides within its projected 1 v/m contour, *i.e.*, 2.83%, and a very minimal or negligible showing of external cross-modulation interference has been made, we believe it would be unreasonable to require Capitol to make an alternate site showing to justify a waiver which it has affirmatively shown to be warranted. Under these circumstances, the question of whether or not Capitol made an adequate record showing to determine the availability or feasibility of an alternative site or two-site operation becomes irrelevant. Capitol has satisfactorily rebutted Chemical's allegations of external cross-modulation interference and demonstrated that the public interest would be served by a grant of its application.

6. Accordingly, IT IS ORDERED, That the application of Capitol Broadcasting Corporation (File No. BP-18309) for a construction permit to increase the daytime power of WCAW IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
SYLVIA D. KESSLER,
Member, Review Board.

APPENDIX

RULINGS ON EXCEPTIONS OF CHEMICAL CITY BROADCASTING COMPANY

A. FINDINGS OF FACT

Exception No.	*Ruling*
1	Granted.
2, 3, 4, 5, 6, 7	Denied, as being of no decisional significance. See paragraph 5 of this Decision.

B. CONCLUSIONS OF LAW

1	Denied. See paragraphs 3 and 4 of this Decision.
2	Denied, as being of no decisional significance. See paragraph 5 of this Decision.
3, 4	Denied, for the reasons stated in the whole of this Decision.

[8] In this connection, the Board notes that the quantum of proof necessary to justify waiver of a technical rule varies with the seriousness of the problem presented. *WHOO Radio, Inc.* (*WHOO*), *supra*, 4 FCC 2d at 440, 8 RR 2d at 89. Accordingly, given the relatively small degree of technical violation here, Capitol's burden is slight.

RULINGS ON EXCEPTIONS OF CAPITOL BROADCASTING CORPORATION

Exception No.	*Ruling*
1	Granted, in substance, with respect to the first sentence; denied, as of no decisional significance, with respect to the second sentence.
2	Granted, to the extent that the record does establish the presence of reradiation. Denied, in other respects, as of no decisional significance.
3	Denied. The Judge's findings adequately reflect the record evidence.
4, 6, 8, 10	Granted, in substance.
5	Denied. The Presiding Judge did not abuse his discretion by accepting the exhibit or making findings thereon, since no party was prejudiced by his action.
7	Granted.
9	Denied, as being of no decisional significance. See paragraph 5 of this Decision.

FCC 73D-47

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of: CAPITOL BROADCASTING CORP. (WCAW), CHARLESTON, W. VA. For Construction Permit	Docket No. 19580 File No. BP-18309

APPEARANCES

Donald E. Ward on behalf of Capitol Broadcasting Corporation; *E. Theodore Mallyck* on behalf of Chemical City Broadcasting Company; and *Joseph Chachkin* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE CHESTER F. NAUMOWICZ, JR.

(Issued August 21, 1973; Released August 24, 1973)

PRELIMINARY STATEMENT

1. By order released September 7, 1972, the application of Capitol Broadcasting Corporation to modify the facilities of Station WCAW, Charleston, West Virginia was designated for hearing on the following issues:

1. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of Station WCAW and the availability of other primary aural (1 mv/m or greater in the case of FM) service to such areas and populations.
2. To determine whether the proposed operation is in compliance with Sec. 73.24(g) of the Commission's rules concerning population within the 1 v/m contour and, if not, whether circumstances exist which would warrant a waiver of said section.
3. To determine in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

2. The applicant published notice of the hearing and notified the Commission thereof pursuant to the governing statute and rules. Conferences and hearings were held on various dates between October 3, 1972 and July 12, 1973, the record being closed on the later date. The filing of Proposed and Reply Findings was concluded on August 13, 1973.

FINDINGS OF FACT

Issue No. 1: Areas and Populations

3. WCAW presently operates on 680 kHz, 250 W, 10 kW-LS, DA-N, U. It proposes to modify to 680 kHz, 250 W, 50 kW-LS, DA-2, U. The proposed change would increase daytime coverage in all

directions except 15° and 135°, in which directions there would be some loss of service. The gains and losses within the 0.5 mv/m contour would be as follows:

	Population	Percent of present	Area (square miles)	Percent of present
Present	429,957		4,808	
Proposed	690,965		10,126	
Gain	269,395	62.6	5,423	112.8
Loss	8,387	1.95	105	2.18
Net gain	261,008	60.7	5,318	110.6

4. Three communities of 2,500 persons or more would each receive a 2.0 mv/m signal from WCAW for the first time. Ripley, West Virginia (3,244) would receive its first primary standard broadcast service and its third aural service. Point Pleasant, West Virginia (6,122) would receive a third primary standard broadcast service and fifth aural service. Gallipolis, Ohio (7,490) would receive a second primary AM signal and fifth aural service. No community of 2,500 or greater population would lose its existing primary service from WCAW.

5. A total of 50 AM and 27 FM stations serve portions of the proposed gain area. None serve as much as 75% of the area; only one serves as much as 50%; and only three others serve more than 25%. Over 80% of the population within the rural gain area now receives primary service from 5 or more AM stations. However, the following tabulation indicates the number of services which would be available throughout presently underserved portions of the gain area:

	Population	Area (square miles)
First AM service	4,338	68
First aural service	1,094	68
Second AM service	11,672	192
Second aural service	4,182	192
Third AM service	14,046	229
Third aural service	11,092	229

6. Fourteen AM and eight FM stations provide primary service within various portions of the loss area. The minimum number of existing services within any portion of the loss area is four.

Issue No. 2: Rule 73.24(g)

7. To establish the location of its 1 V/m contour WCAW relied on four sets of measurement data: (1) its own July and August, 1965 proof of performance on the present facilities; (2) its own July, 1968 measurements along its 349° radial; (3) its own September, 1972 measurements along its 60° radial; and (4) WTIP's April, 1972 measurements along WCAW's 15°, 28°, 60°, 80°, 298°, 328°, and 349°

radials.[1] Where one radial was measured more than once, a composite analysis was made. From its analyses WCAW concluded that the following conductivities exist:

Direction (degrees true):	*Conductivity (mmhos/m)*
15	0.5
28	.5
60	.5
80	.5
298	1.5
328	2.0
349	[1] 3.0

[1] After 3 miles the conductivity changes to 2 mmhos/m. At 10 miles it changes to 15 mmhos/m remaining at that figure to 29 miles, beyond which point no measurements were taken.

8. In October 1972, WCAW conducted a count of all of the habitable dwelling places within the 1 V/m contour as determined above. It showed 681 single family dwellings, 651 apartment units, and 19 duplex houses. Using the 1970 census ratio of 2.72 persons per household, the number of persons inhabitating those structures would be 3.722. In addition, a Morris Harvey College dormitory with a capacity of 767 students, a home for the aged with a capacity of 50 persons, and a mission building housing 38 persons were located within the 1 V/m contour. Thus, the contour encompasses a total of 4,852 persons. This is 2.83% of the 162,114 persons residing within WCAW's proposed 25 mv/m contour.

9. WTIP also submitted a measurement analysis wherein it determined conductivity based entirely on its own measurements. These calculations showed substantially greater conductivity on the 28°, 60°, and 80° radials. As a result WTIP concluded that the 1 V/m contour would extend substantially further from the WCAW transmitter in these directions and embrace a greater population.

10. However, no findings will be based on the WTIP submission. The procedures employed suffer from two flaws, either of them fatal. As indicated at footnote 1, *supra*, all of WTIP's measurements were taken on stub radials, the longest extending only 2.13 miles from the WCAW transmitter. Rule 73.186, which governs the techniques for establishing effective fields, requires that radials be measured out to 15 or 20 miles from the transmitter. While circumstances may preclude total compliance with the rule without invalidating the utility of the data obtained, so gross a departure from its standards cannot be condoned, *Oklahoma Press Publishing Co.*, 8 RR 2d 878.

11. Further, WTIP failed to calculate a 25 mv/m contour for proposed WCAW based on what it contends to be the measured conduc-

[1] The various measurements taken by WCAW and WTIP are tabulated as follows:

Radial	Number of measurements			Range of measurements (miles)		
	WTIP	WCAW (1965)	WCAW (1968)	WTIP	WCAW (1965)	WCAW (1968)
15°	15			0.066–0.80		
28°	15	19		.056–1.02	0.10–17.3	
60°	16	17		.054–1.47	.59–14.45	
80°	20			.054–1.61		
298°	16	28		.056–2.10	.10–19.9	
328°	15	21		.066–2.13	.10–16.9	
349°	16		29	.066–1.34		0.10–20.5

tivity. Such a procedure is both illogical and unfair. If in fact ground conductivities are greater than calculated by WCAW, it follows that both the station's 1 V/m and 25 mv/m contours would fall further from the transmitter and that greater populations would be included within each contour. Since Rule 73.24(g) is based upon a ratio between the 1 V/m and the 25 mv/m populations, both must be calculated on the same basis or the result lacks meaning.

12. WTIP introduced evidence designed to show that WCAW as presently operating is causing cross-modulation to the WTIP signal. On January 19 and 20, 1972 its engineer conducted a sampling in the general vicinity of the WCAW transmitter. He employed two automobile receivers, a portable receiver, and two field intensity meters. He discovered cross-modulation at 5 locations.[2]

13. On September 19, 1972, WCAW's consultant conducted a similar sampling. His observations were made with an automobile receiver, supplemented by a hand-held transistor radio and a field intensity meter. He detected cross-modulation of WTIP from WCAW at only one of the locations reported by WTIP's engineer [3] and at one additional location directly under a power line.[4]

14. Thereafter, between November 13, and December 28, 1972, WTIP's chief engineer made listening tests at 21 locations. He used both an automobile radio and a portable receiver. His results were as follows:

1. In front of 1573–5 Virginia Ave., brick homes with electric, telephone and CATV lines across the street; 8 observations; detectable cross-modulation [5] on 6 occasions, none on 2.

2. In front of 1570–80 Lee St.; frame, stucco or brick houses, telephone lines across the street, electric and CATV lines across the street for half the distance but cut across the street and run in front of houses for other half; 26 observations; strong cross-modulation[6] on 5 occasions, detectable on 21.

3. In front of 1538–46 Lee St.; frame, stucco or brick houses, electric and CATV lines in front of houses, telephone lines across the street; 26 observations; strong on 10 occasions, detectable on 16.

4. In front of 2018 Quarrier St.; brick house, electric, CATV and telephone lines across street; 26 observations; strong on 3 occasions, detectable on 18, none on 5.

5. Approximately 0.25 miles east of California Ave. on Peidmot Rd.; electric lines overhead; 8 observations; detectable on 4, none on 4.

6. In front of 36th St. from Virginia Ave. to two buildings east; brick apartment and duplex; electric, telephone and CATV lines overhead, metal transmission tower one block north; 10 observations; detectable on 8, none on 2.

7. In front of 37th St. in vicinity of Virginia Ave.; electric lines overhead; 6 observations; detectable on 2, none on 4.

8. In front of 707 Chappell Rd.; brick house with electric, CATV and telephone lines overhead; 7 observations; detectable on 5, none on 2.

9. In front of 4705–15 Chesterfield Ave.; brick houses with electric, telephone and CATV lines overhead; 9 observations; detectable on 7, none on 2.

10. In front of 3400 block of Chesterfield Ave.; electric and telephone lines overhead; 9 observations; strong on 7, none on 2.

11. In front of 625–7 Granada Way; frame houses with electric, telephone and CATV lines across street; 6 observations; detectable on 2, none on 4.

12. South Park Rd. at Granada Way; electric, telephone and CATV lines across street; 6 observations; detectable on 4, none on 2.

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[2] Lee Street between 1570 and 1580; Ruffner Ave. near 306, 501, and 505–7; and Kanawha Ave., S.E. near 2512.

[3] In front of 1572 Lee St.

[4] At the corner of East Ave. and Washington.

[5] Detectable cross-modulation is defined as the ability to hear WCAW's signal at such moments as WTIP's signal was not actually carrying sound.

[6] Strong cross-modulation is defined as sufficient for WCAW's signal to override WTIP's.

13. In front of 2914–28 Chesterfield Ave.; frame and brick houses with electric and CATV lines in front of houses and electric and telephone lines across street; 5 observations; detectable on 2, none on 3.
14. 31st St. in front of brick dormitory with electric, telephone and CATV lines in front of building; 7 observations; detectable on 2, none on 5.
15. In front of 30th St. and Virginia Ave.; frame house with electric and CATV lines in front and electric and telephone lines across street; 7 observations; detectable on 5, none on 2.
16. In front of 200–07 Shawnee Circle; brick, stone or masonry houses with electric, telehone and CATV lines in front of houses or across street; 9 observations; detectable on 7, none on 2.
17. In front of 2512–18 Kanawha Ave.; brick houses with electric, CATV and telephone lines in front; 26 observations; strong on 10, detectable on 10, none on 6.
18. In front of 306 Ruffner Ave.; 16 observations; detectable on 3, none on 13.
19. In front 501 Ruffner Ave.; 16 observations; detectable on 4, none on 12.
20. In front of 505–7 Ruffner Ave.; 16 observations; detectable on 3, none on 13.
21. Oakwood Rd. between Cantley Dr. and Fort Hill Dr.; 16 observations; strong on 3, detectable on 3, none on 10.

15. On January 8, 1973 WCAW conducted a telephone survey of the residences in front of which WTIP had detected cross-modulation. The question asked was, "This is a radio listnership survey. We're attempting to ascertain the quality of radio reception in the Charleston area. Would you be good enough to tell us, have you experienced any difficulty in listening to any of Charleston's radio stations?"

16. Thirty-seven responses were obtained. Thirty-two stated that they had experienced no difficulty. Of those who complained only two referred to WTIP; one of those said the station had gone off the air on January 7, and the other mentioned "static".

17. On the question of whether WCAW might move to another site to eliminate the blanketing problem, the evidence originally offered was skimpy. WCAW's consulting engineer noted that the station has protection requirements which necessitated extensive measurements on critical radials toward stations in Corbin, Kentucky; Raleigh, North Carolina and Canada in connection with the instant application. It was his opinion that similar expensive measurements would be necessary at any alternate site, and that to conduct them it would be necessary to clear, drain and level the proposed site and erect a tower of substantial height. However, he did not proffer this opinion with any specific alternate site or sites in mind.[7]

18. On the other hand, WTIP's consulting engineer expressed the opinion that there would not be much difficulty in obtaining suitable sites sufficiently outside of Charleston to solve the blanketing problem. However, he based this opinion merely on a study of topographic maps and on his experience in site acquisition for other clients in West Virginia. He made no reference to specific sites, and he did not fully consider the limits which protection requirements might impose on site selection.

19. Because no genuine study has been conducted by either party a conference was convened on April 27, 1973, after the original closing of the record, in order that the problem might be given further con-

[7] The record does not indicate how far or in what direction from the present site it would be necessary for WCAW to move in order to comply with the blanketing rule. Thus, it is impossible to form an opinion as to whether in view of the distances to the stations to be protected, new measurements would be a realistic necessity.

sideration. The record was reopened to afford either party an opportunity to offer more concrete proof of the opinions earlier proffered by their consulting engineers.

20. At the further hearing sessions it was developed that because of the low power of WCAW's nighttime operation and the low conductivities which characterize the Charleston area, it would be impossible to move the nighttime operation more than a mile from the present site and still provide an adequate signal to Charleston. No additional site within one mile of the present site is available. Hence, if WCAW's instant daytime proposal is to be effectuated it would be necessary to establish a two transmitter operation, with the nighttime transmitter remaining on the present site, and the daytime transmitter being moved to a more distant location.

21. However, even if a two transmitter operation were to be considered, it is less than clear from this record that any suitable site is available for the daytime transmitter. The consulting engineers for both WCAW and WTIP studied topographic maps to ascertain if there were any sites within a reasonable distance of Charleston to which the daytime transmitter might be relocated. Each found approximately a dozen. However, with one exception no further study was given to the sites to determine if they were suitable on other than topographic considerations of whether they were available.

22. The single exception was WTIP's site 13, located some 1.7 miles SSW of WCAW's present site. This location was found to possess sufficient relatively flat ground for the installation of WCAW's 3 tower directional array. However, it appears that the land on which the towers would have to be located is in the hands of more than one owner, and it is not shown on this record that all of the owners would consent to the use of the land as a transmitter site.

23. In any event, WCAW contends that a two site operation would be prohibitively expensive. It offered into evidence cost figures for the establishment of a second transmitter site. No findings will be made based on these figures. Plainly, they were based on worst possible case estimates rather than realistic calculations. Nevertheless, it is apparent that it would be expensive to install a second transmitter on any new site, and such expense must properly be weighed against the likely benefit to be derived therefrom, *O.K. B/Cing Corp.*, 2 RR 2d 311.

24. In addition to its claim that no alternative site is available, WCAW offers two arguments in favor of waiver of the blanketing rule. First, it contends that there is a need for its specific service throughout the gain area. It offered the testimony of a representative of the Charleston Area Committee of 100, Inc., an economic and social development group seeking to stimulate regional development, to the effect that Charleston, Huntington 60 miles to the west, and Parkersburg 70 miles to the north are becoming a single regional market. WCAW seems to claim that this market needs a single advertising outlet which it could supply. However, the only real evidence of the existence or nature of this rather sophisticated market concept was the showing that road connections between these widely separated communities have recently improved, and that a new shopping mall in Parkersburg has done some advertising in the Charleston area. Such

proof is not adequate to demonstrate the existence of so geographically vast a retail market or to demonstrate its advertising needs.

25. WCAW also claims that its program service would be particularly useful throughout the gain area. However, the proof fails to sustain this claim. The station has a country and western format. It has one full-time news employee who is assisted by other staffers as may become necessary. Although it presents local and regional news, it does not devote regular individual newscasts or portions thereof to such news. It covers local and regional events if they are newsworthy, but it is not shown to specialize in such coverage on a regular basis. The record does not indicate that WCAW's news presentations differ materially from those of other area stations. It is not proposed to present any new programs if the proposed modification is granted.

26. The foregoing is not intended to derogate WCAW's programming. Its attention to the needs and interests of its listeners appears to be entirely adequate. However, the nature of its programming is not such as to indicate that its service would be materially more responsive to needs in the gain area than that of any other station.

27. Finally, WCAW notes that it is the designated Emergency Broadcast Station for Charleston, and the Office of Civil Defense has expended some $26,000 in "hardening" its transmitter site in order to enhance the prospects of its being able to function in the event of nuclear attack. This investment would be wasted in the event the transmitter site were to be moved.

CONCLUSIONS

Issue No. 1: Areas and Populations

28. Information as to the areas and populations which would be affected by WCAW's proposed modifications is set forth at paragraphs 3–6, *supra*, and need not be repeated.

Issue No. 2: Blanketing

29. Plainly, WCAW's instant proposal is in violation of Rule 73.24 (g). Whereas that rule contemplates that no more than 1% of the population within the 25 mv/m contour shall reside within the 1000 mv/m contour, proposed WCAW would include nearly 3 times that number, 2.83%, within its 1 V/m contour. Thus, the matter for resolution becomes whether, in the circumstances of this case, the public interest would be served by waiver of the rule.

30. Initially, it should be noted that Rule 73.24(g) is not a mere technical requirement unrelated to the actual service which would be brought to the public. The need for the rule is outlined in *WHOO Radio, Inc.*, 8 RR 2d 83.

31. Of course, the blanketing rule is not to be applied blindly. As with any other rule applicants are to be permitted to show that its enforcement in a particular case would be inappropriate, *WAIT Radio* v. *F.C.C.*, 418 F2d 1153. However, "as a general proposition waivers of the Commission's Rules are restricted to those instances in which it would be impossible for an applicant to comply with the strict requirements of a rule, or where under the circumstances of the proceeding it would be inequitable to demand such strict compliance". *James J. B. Scanlon*, 9 RR 2d 1365.

32. On this record WCAW has succeeded in demonstrating that the rule should be waived. Of crucial importance is the showing that the deleterious effects of blanketing are not especially likely to occur in Charleston. Although WTIP succeeded in detecting cross-modulation at a number of outdoor locations in the near vicinity of WCAW's transmitter and in the immediate presence of reradiators, WCAW's survey revealed that such cross-modulation is not detectable on the actual receivers in use in adjacent homes. That is to say, there is no present cross-modulation problem in Charleston which is likely to be aggravated by WCAW's proposed increase in power.

33. Moreover, there is no alternative site from which WCAW could effectuate the substance of its proposal while eliminating the blanketing problem. The station cannot provide an adequate nighttime signal to Charleston if it moves more than one mile further from the city, and there are no sites available within a mile. While it would be theoretically possible for WCAW to effectuate its proposal by setting up a two site operation with the nighttime transmitter remaining at the present site, this record does not demonstrate that any site suitable for the daytime transmitter is actually available. In any event, in the absence of convincing evidence of an usual likelihood of reception problems in the area, it would be inequitable to compel WCAW to incur the expense and inconvenience incident to a two transmitter operation.

34. Thus, the question for decision is whether the public benefits to be derived from WCAW's proposal outweigh the fact that the blanketing rule would be violated. It is concluded that they would. Substantial areas and populations would be brought a new service. Under similar circumstances where the services gained and lost were of similar orders of magnitude it has been held that waiver of the blanketing rule would be in the public interest, *O.K. B/Casting Corp.*, 2 RR 2d 311; *WHOO Radio, Inc.*, 8 RR 2d 83. Indeed, the facts in this case present a somewhat more compelling argument for waiver than in either *O.K.* or *WHOO*. In both of those cases a minimum of 3 services were already available throughout the gain area, whereas here over 1,000 persons now without any reception service whatsoever would receive a first aural service, over 4,000 persons would receive a second aural service, and 11,000 persons would receive a third aural service. It is concluded that the public interest would be served by waiver of Rule 73.24(g), and grant of the WCAW application.

Accordingly, IT IS ORDERED, That unless an appeal is taken to the Commission by a party or the Commission reviews the Initial Decision on its own motion pursuant to Rule 1.276, the application of Capitol Broadcasting Corporation IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
CHESTER F. NAUMOWICZ, JR.,
Administrative Law Judge.

FCC 74R-131

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of CITY OF KIRKSVILLE, KIRKSVILLE, MO.	Docket No. 19767 File No. 117-A-L-53
HORIZON AIRWAYS, INC., KIRKSVILLE, MO. For Aeronautical Advisory Station To Serve Clarence Cannon Memorial Airport, Kirksville, Mo.	Docket No. 19768 File No. 43-A-L-43

APPEARANCES

Geoffrey L. Gifford, on behalf of City of Kirksville; *William Y. Frick*, on behalf of Horizon Airways, Inc.; and *Robert P. DeYoung*, on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

DECISION

(Adopted April 5, 1974; Released April 12, 1974)

BY THE REVIEW BOARD: BERKEMEYER AND PINCOCK. BOARD MEMBER KESSLER CONCURRING IN THE RESULT.

1. The mutually exclusive applications of Horizon Airways, Inc. (Horizon) and City of Kirksville (the City) for an aeronautical advisory station to serve Clarence Cannon Memorial Airport in Kirksville, Missouri were designated for hearing on the following issues by Order of the Chief of the Safety and Special Radio Services Bureau, published June 15, 1973, in 38 FR 15746:

(a) to determine which applicant would provide the public with better aeronautical advisory service based on the following considerations:
(1) location of the proposed radio station in relation to the landing area and traffic patterns;
(2) hours of operation;
(3) personnel available to provide advisory service;
(4) experience of applicant and employees in aviation and aviation communications;
(5) ability to provide information pertaining to primary and secondary communications as specified in Section 87.257 of the Commission's rules;
(6) proposed radio system including control and dispatch points; and
(7) the availability of the radio facilities to other fixed-base operators.
(b) to determine in light of the evidence adduced on the foregoing issues which, if either, of the applications should be granted.

Hearing was held before Administrative Law Judge Frederick W. Denniston at Kirksville, Missouri, on August 28 and 29, 1973. In an Initial Decision, FCC 73D-64, released December 18, 1973, the Judge found that the location of Horizon's aeronautical advisory station in relation to the landing area and traffic patterns was more advantageous than the location proposed by the City and that the personnel avail-

able to operate Horizon's station were more experienced in aviation and in the operation of a unicom station than the personnel available to the City. Furthermore, the Judge found that in past dealings between Horizon and the City, the latter had demonstrated a bias against Horizon. He thereupon concluded that the City could not be relied upon to provide service in a fair and unbiased manner as required by Sections 87.257 (a), (b), and (d) of the Commission's Rules.[1] Accordingly, he concluded that Horizon's application should be granted and the application of the City denied. The City filed exceptions to the Initial Decision on January 14, 1974. No party has requested oral argument and it does not appear that resolution of this proceeding would be facilitated by such argument. The Board has carefully considered the record in this proceeding, and the Initial Decision and the exceptions thereto, and is satisfied that the Judge's findings are accurate and adequate, and that his conclusions are, on the whole, correct. Therefore, the Judge's findings and conclusions are adopted, except as modified by this Decision and in our rulings on the exceptions attached hereto as Appendix I.

2. The City's major exception is to the Judge's ruling which permitted Horizon to present considerable evidence concerning prior dealings between the City and Horizon. Ostensibly, the purpose of that evidence was to show that the City had discriminated against Horizon and thus could not, as the licensee of an aeronautical advisory station, be relied upon to carry out its obligation to provide fair and unbiased service as required by Sections 87.257(a), (b), and (d) of the Commission's Rules. The City contends that the question of discriminatory dealing is not within the scope of the issues set forth in the designation Order, and that consequently the City was not prepared to defend against Horizon's attack. Moreover, the City argues that even if the evidence is permitted to remain in the record the findings and conclusions reached by the Judge are not warranted by the evidence.

3. In the Board's view, the issues specified in the designation Order, while not as precise as they might be, are broad enough to permit the showing tendered by Horizon concerning its prior dealings with the City. Section 87.257 of the Commission's Rules, which is the subject of sub-issue (a)(5), sets forth the privileges and responsibilities of licensees of aeronautical advisory stations. Among other things, it specifies that during operation of the station service will be provided

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[1] Section 87.257 : Scope of service.

(a) At all times when an aeronautical advisory station is in operation, non-public service will be provided to any private aircraft station upon request and without discrimination.

(b) Communications by an aeronautical advisory station shall be impartial with respect to information concerning available ground services.

(d)(1) Communications by an aeronautical advisory station shall be limited to the necessities of safe and expeditious operation of private aircraft, such as, conditions of runways, types of fuel available, wind conditions, weather information, dispatching, or other necessary information; provided, however, that at any landing area at which an airdrome control station or FAA flight service station is located, an aeronautical advisory station shall not transmit information pertaining to the conditions of runways, wind conditions, or weather information during the hours of operation of the airdrome control station or FAA flight service station.

(2) On a secondary basis, communications may be transmitted which pertain to the efficient portal-to-portal transit of which the flight is a portion, such as, requests for ground transportation, food or lodging required during transit.

(3) Communications between an aeronautical advisory station and air carrier aircraft shall be limited to the necessities of safety of life and property in the air.

(4) When assigned in accordance with Section 87.253(d), 122.85 or 122.95 MHz may be used for communication only with aircraft at altitudes greater than 10,000 feet above the elevation of the landing area.

upon request and *without discrimination*. Moreover, it provides that communications by such stations "shall be limited to the necessities of safe and expeditious operation of private aircraft, such as, condition of runways, types of fuel available, wind conditions, weather information, dispatching, or other necessary information." Since the rule, *supra*, requires that the service rendered be impartial and without discrimination, the evidence complained of is relevant to a resolution of this issue. Furthermore, we are not convinced that the City was in any way prejudiced by the admission of such evidence. It is clear that the City, having been a party to all of the encounters relied upon by Horizon, was fully familiar with the facts.[2] Moreover, counsel who represented the City in this proceeding has also represented the City in its other dealings with Horizon and was therefore not disadvantaged by the context in which those matters arose in this proceeding.

4. The record evidence reveals that the applicants have frequently disagreed as to the terms of contracts to which they were both parties and the requirements of the FAA with respect to the administration of Clarence Cannon Memorial Airport, and that on some occasions Horizon has been unsuccessful in its other dealings with the airport administration. However, in our view, these differences, some of which are the subjects of judicial and administrative proceedings initiated by Horizon, do not warrant a conclusion that either applicant will be in capable of providing or will not, in fact, provide impartial service to all. The airport manager testified very specifically that if the City is licensed to operate the aeronautical advisory station it will perform its obligations as required by Section 87.257, impartially and without discrimination. The controversies described in the record, viewed in light of this testimony, do not justify a conclusion that the City would not comply with the Commission's Rules in this respect. Moreover, it is clear from the record that information essential to aircraft approaching the airport will be equally accessible to either applicant,[3] and that the plant proposed by each applicant will be technically adequate to render the service contemplated by the rule. The technical difficulties encountered by Horizon when it initiated its temporary service at Clarence Cannon Memorial Airport have been corrected [4] and will pose no problems to its proposed permanent installation. Moreover, based on the testimony of the airport manager of the City and the president of Horizon, the Board is satisfied that if either application is granted, the licensee will endeavor to provide service to all those using the airport in a fair and unbiased manner.

5. The City has also challenged the Judge's findings and conclusions concerning the location of the proposed station. It contends that since the location which it proposes to use is purely temporary pending the construction of a new fire station for which it now has plans and is prepared to let bids, the Judge should have found its location equal, if not superior, to that proposed by Horizon. The Board agrees with

[2] Much of the testimony concerning these matters was first elicited on cross-examination of the City's principal witness.

[3] The fact that Kirksville operates the Kirksville weather station on contract with the U.S. Weather Bureau gives it no advantage over Horizon which can obtain all pertinent current information, including information collected at the Kirksville Station, from the Columbia, Missouri weather station.

[4] The initial problems arose because of an inefficient temporary antenna. Those problems were resolved with the installation of a permanent antenna.

the Judge's treatment of this issue. The issues in Commission proceedings must be resolved on the basis of the factual situation existing at the time the record is made. We cannot consider possible changes which would necessitate amendments to applications and which would occur only upon the happening of some contingent event, such as the ultimate construction of the proposed fire station.[5] Moreover, the Board fully agrees with the Judge's finding and conclusion that the location proposed by Horizon is superior to that now proposed by Kirksville. The Judge concluded that neither applicant could be preferred because of the hours it proposed to operate. In this regard, the Board notes that both applicants have indicated that if certain contingencies occur, they would operate the station on a twenty-four hour basis. Again, however, we must confine our considerations to the facts as they presently exist. Thus, Horizon will provide intermittent service between 6 AM and 9 AM,[6] continuous service between 9 AM and 5:30 PM and intermittent service between 5:30 PM and 8:30 PM; and, until construction of the fire station is completed, the City would not operate its unicom station more than 15 hours per day.[7] In these circumstances, the Board is persuaded that neither applicant should be preferred because of the hours it proposes to operate. As to the personnel available to operate the unicom station, the Board is satisfied, based on findings made by the Administrative Law Judge which are fully supported by facts of record, that Horizon and its employees are more experienced in aviation and aviation communications than are the City's employees and, thus, Horizon should be preferred on this criterion. The Board finds no significant difference among the applicants with respect to any of the other comparative criteria. Therefore, the Board concludes that the application of Horizon for an aeronautical advisory station to serve Clarence Cannon Memorial Airport, Kirksville, Missouri, should be granted and the application of the City denied.

6. Accordingly, IT IS ORDERED, That the application of Horizon Airways, Inc. (File No. 43–A–L–43) for an aeronautical advisory station to serve Clarence Cannon Memorial Airport, Kirksville, Missouri, IS GRANTED; and the application of the City of Kirksville (File No. 117–A–L–53) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
DEE W. PINCOCK,
Member, Review Board.

[5] The airport manager conceded on cross-examination that taxiway construction had been delayed for more than one year from the invitations to bid because the first bids were too high, and that the construction of the new fire station depends entirely upon the city council's approval of the bids it receives.

[6] During these hours only one person would be present at the office and because of other duties might not always be available to operate the unicom.

[7] The City has testified that its unicom would be operated by its linesmen (persons who pump gas). The record shows that linesmen employed by the City were, at the time of the hearing, on duty from 7:00 AM to 10:00 PM and if the unicom were to be operated 24 hours per day additional personnel would be necessary. Furthermore, the record shows that the plan to operate 24 hours has been discussed in general terms but has not been approved by the city council nor have funds to implement it been approved.

APPENDIX

RULINGS ON EXCEPTIONS FILED BY CITY OF KIRKSVILLE

Exception No.	*Ruling*
1	Denied. See paragraph 3 of this Decision.
2	Granted. There is not sufficient evidence of record to determine whether or not the unicom station at Clarence Cannon Memorial Airport was licensed or not.
3, 4, 16, 18	Denied. See paragraph 5 of this Decision.
5, 13	Denied as being of no decisional significance.
6	Denied. The record indicates that under some circumstances the operation of the proposed unicom station may be delegated by contract.
7, 9, 11, 15, 19	Denied. The findings and conclusions excepted to fairly and accurately reflect the facts of record.
8	Denied. The testimony concerning this matter is uncontroverted. The City made no effort to rebut the fact.
10	Granted. The record indicates that there was a dispute as to what constituted available hangar space but that there was space in the hangar which could have been and sometimes was used by Horizon to store its airplane.
12	Granted. Paragraph 21 of the Initial Decision is modified to show that the airport administration and Horizon have had frequent disagreements concerning the use of hangar space at the airport. However, it is clear that some hangar space has been available to Horizon but that the administration has on some occasions not agreed with Horizon as to the proper use of that space.
14	Granted. The second sentence of paragraph 32 is modified by deleting the words "apparently prior to the erection by Horizon of its outdoor antenna."
17	Granted. Neither applicant proposes 24 hour service initially. See paragraph 5 of this Decision.
20	Denied. The conclusion is properly supported by the Judge's findings and the facts of record.
21	Granted. The City did in fact after some delay approve the installation of a permanent antenna.
22, 24	Granted in part. See paragraph 4 of this Decision.
23, 25, 26	Denied. The conclusion is warranted by the facts of record and the findings in this proceeding.
27	Granted in part. The record warrants the conclusion that if certain contingencies occur the City may contract with Glaspie to operate its unicom station.
28	Denied for the reasons set forth in this Decision.

104-035--74---- 4

FCC 73D-64

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of CITY OF KIRKSVILLE, KIRKSVILLE, Mo.	Docket No. 19767 File No. 117-A-L-53
HORIZON AIRWAYS, INC.,[1] KIRKSVILLE, Mo. For Aeronautical Advisory Station To Serve Clarence Cannon Memorial Airport, Kirksville, Mo.	Docket No. 19768 File No. 43-A-L-43

APPEARANCES

Geoffrey L. Gifford, on behalf of City of Kirksville; *William Y. Frick*, on behalf of Horizon Airways, Inc.; and *Robert P. DeYoung*, on behalf of the Safety and Special Radio Services Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
FREDERICK W. DENNISTON

(Issued December 12, 1973; Released December 18, 1973)

1. By mutually exclusive applications, each of the above applicants seeks to supply aeronautical advisory radio service at the Clarence Cannon Memorial Airport, Kirksville, Missouri. The applications were accordingly designated for hearing on the following issues:

(a) to determine which applicant would provide the public with better aeronautical advisory service based on the following considerations:
(1) location of the proposed radio station in relation to the landing area and traffic patterns;
(2) hours of operation;
(3) personnel available to provide advisory service;
(4) experience of applicant and employees in aviation and aviation communications;
(5) ability to provide information pertaining to primary and secondary communications as specified in Section 87.257 of the Commission's rules;
(6) proposed radio system including control and dispatch points; and
(7) the availability of the radio facilities to other fixed-base operators.
(b) to determine in light of the evidence adduced on the foregoing issues which, if either, of the applications should be granted.

Hearings were held in Kirksville, Missouri on August 28 and 29, 1973. Proposed findings were filed by each applicant and the Safety and Special Radio Services Bureau (Bureau) of this Commission by October 26, 1973.

[1] This applicant was incorrectly identified in the designation order as "Dr. Arnold S. Barber d/b/a Horizon Airways, Inc." The application is actually that of the corporation, of which Dr. Barber is the President (Tr. 15). The caption is corrected accordingly.

PRELIMINARY STATEMENT

2. An unusual aspect of this proceeding is that, notwithstanding the bland nature of the specified issues, lively controversies exist which had not been disclosed to the Commission prior to the designation of the applications for hearing, or before the hearing itself. These controversies relate to the present service provided by Horizon Airways, Inc. (Horizon) under temporary authority, and to various acts of the City of Kirksville (City) with respect to Horizon, which the latter contends are discriminatory.

3. When the latter controversy first arose at the hearing, the Bureau took the position that not having been before the Commission when it framed the designation order, evidence of alleged discrimination was inadmissible. The Presiding Judge ruled, however, that such evidence was admissible under Issue (5). In its proposed findings, the Bureau contends that if such evidence is admissible, heavy weight should be given to it in the light of the Commission's enforcement problems in this area.

4. The ruling on admissibility is reaffirmed. The matters alluded to will be found discussed under Issue (5).

5. The services here proposed are to be provided at the Clarence Cannon Memorial Airport (Airport), serving Kirksville, and which is owned and operated by the City. Kirksville, with a population of 16,000–18,000, is the home of two colleges, Northeast Missouri State University with an enrollment of about 5,500 and Kirksville College of Osteopathic Medicine with an enrollment of 450.[2]

6. Until April 29, 1973, the Federal Aviation Administration (FAA) maintained a Flight Service Station at the Airport but it was decommissioned on that date. While a former Airport administrator, Homer Morelock, had operated a Unicom service at the Airport for some indeterminate period, apparently without FCC license, there had been no transmissions for some time prior to March 26, 1973, on which date Horizon filed its instant application. Effective April 10, 1973, Horizon received a temporary authorization to render the service. On May 9, 1973, the City filed its competing application.

FINDINGS OF FACT

7. Either of the applicants, if successful, would permit the other to establish a dispatch point as provided in Section 87.75(e) of the Commission's Rules.

Issue (1)—Location of Proposed Stations

8. *City:* The City proposes to locate its station in the General Aviation Building, or old commercial terminal, approximately 300 feet west of the north end of north-south runway 17, the main runway. The building is currently used for fixed-base operations with offices, the national weather wire service[3] and other facilities. It is also adjacent to

[2] While not in evidence, the information concerning Kirksville will be deemed to have been stipulated by the applicants, as each proposes substantially identical findings.

[3] Under contract with FAA, the City maintains a receive-type teletype for the reception of national weather reports. Under another contract, the City makes periodic weather observations which are telephoned to the FAA Flight Service Station at Columbia, Missouri.

the former Flight Service Station where weather observation equipment is housed. From this location the entire runway and south approach can be observed, but not the north approach.

9. The City proposes later to move the station and the weather observation equipment to a fire station building proposed to be constructed at a site 75 feet south of the present commercial aviation building at the midpoint of the runway. At this location will be brought together fire control facilities, weather information service, and other airport services.

10. At the time of the hearing (August 1973) it was estimated that the fire station would be advertised for bids by October 15, 1973, with bid openings November 5, 1973 and construction completed by December 31, 1973. Based on past experience in airport projects, however, these dates are not certain although the Airport administrator did not foresee delays.

11. *Horizon:* Horizon's location, at which it now operates Unicom service under temporary authorization, is in the new Commercial Terminal Building which is at the east side of runway 17 at about its midpoint.

12. Horizon, however, is seeking from the City an allocation of hangar space in which, when provided, it will relocate its Unicom. This would be immediately south of the present terminal building, in plain view of both runways, which it considers an ideal location.

Issue (2)—Hours of Operation

13. If licensed, the City expects to provide 24 hours a day service but this depends on approval of the City Council. On that basis, there would be intervals during the night when the operator would absent himself to make weather observations. The present temporary service of Horizon is scheduled as continuous service between 9:00 a.m. and 5:00 p.m. and intermittent between 6:00 a.m. and 9:00 a.m. and from 5:00 p.m. until 8:30 p.m. If Horizon is granted the permanent license, its proposal in the application is for service from 6:30 a.m. to 8:30 p.m. However, when the hangar space it seeks becomes available, it will go on a 24-hour basis and if traffic warrants or if it is able to assign personnel which could perform clerical or other services during the night it would continue on the 24-hour basis.

Issues (3) and (4)—Personnel Available and Experience

14. *City:* The City will utilize and obtain licenses for its employees who dispense gasoline or operate the fire equipment for operation of the Unicom, but none is now experienced in the operation of Unicom. Moreover, if the City should lose the right to perform the gasoline service at the Airport as the result of pending court litigation it might ask Skyline Aviation (Dale Glaspie) to operate the Unicom for the City. The City takes local weather observations which are forwarded to Columbia, Missouri, for inclusion in the national weather information; the latter in turn is released by teletype to the City and is available to Horizon.

15. *Horizon:* Horizon now has two employees licensed to operate the Unicom and they are experienced in its operation. In addition, Dr. Barber, Horizon's President, is licensed and a female employee has

applied for one. Horizon also intends to hire additional employees who will be both pilots and licensed radio operators.

Issue (5)—Performance of Service Under Section 87.257

16. This issue, as framed, is to "determine which applicant would provide the public with better aeronautical advisory service based on . . . ability to provide information . . . as specified in Section 87.257 . . ." As noted elsewhere, certain matters arose in the course of the hearing which the Bureau felt were not within the intent of this issue. The objection was overruled and the evidence allowed.

17. Section 87.257, in essence, provides (a) that service will be rendered "upon request." It is accordingly deemed that allegations that Horizon has failed to do so under its present temporary authorization is relevant to its ability to do so in the future. The same section also provides (a) and (b) that service will be "without discrimination" and that advice as to ground services shall be "impartial." Allegations by Horizon that it has received discriminatory treatment from the City in its airport operations in the past bear on the question of the City's ability to be non-discriminatory and impartial in the future.

18. Accordingly, both of these sub-issues will be explored herein.

19. *Terminal Space:* Dr. Arnold S. Barber is a practicing dentist and is 98% owner of Horizon. He has piloted planes since 1957 and has logged over 3,000 hours. He is licensed for commercial flying both single-engine and twin-engine aircraft, and is qualified as an instructor. Dr. Barber moved to Kirksville in 1970 and formed Horizon in 1970–71. Horizon owns one twin-engine and one single-engine plane, costing approximately $100,000.00. Horizon provides two scheduled daily flights (five days a week) to Kansas City, and air freight and charter services.

20. Shortly after the completion and dedication of the new terminal building at the Clarence Cannon Memorial Airport, Dr. Barber, in January 1971, sought terminal space for Horizon, Ozark Air Lines and a Dale Glaspie, owner and operator of Skyline Aviation, the operator of a flight training school and an air taxi service, both had space in the terminal. Ozark paid rent for its terminal space, while Glaspie did not. While Barber offered to pay rent, five months passed before terminal space was made available. Even then Horizon had difficulties as the terminal and its gate were kept locked except when Ozark flights were due in midday.

21. *Hangar Space:* Early in its operations, Horizon sought to rent hangar and shop space at the Airport, but it had not been made available as of the time of hearing, nor has it been informed it would receive space. As an alternative, Horizon has offered to build its own hangar if the City would lease it the ground. In furtherance of the latter alternative, plans for such a hangar were submitted to the City in April 1973. Again, on May 24, 1973, Horizon's attorney wrote the City attorney reiterating his proposal to either rent or build hangar space, but had no response as of the date of hearing. The lack of hangar space has a severely harmful effect on Horizon operations and it is required to ferry its planes to other areas for maintenance, at a marked increase in costs. Horizon's proposal to erect a hangar of the same specifications as those of Skyline, whose proposal has been ac-

cepted, has not been acted on. Moreover, while some space is allocated to Horizon in existing hangars, on a number of occasions it has been prevented by the City from utilizing the space even though it was unoccupied.

22. *Gasoline:* Horizon sought the right to fuel its own aircraft, beginning in January 1972, and its lease with the City contained a specific provision allowing it to do so. When it advised the City Manager in August 1972, that it intended to exercise that right, Dr. Barber was informed it could not do so. When he called attention to the provision of the lease, he was advised he should not exercise it as it might jeopardize renewal of the lease by the City. The lease, which expired by its terms in December 1972, has never been renewed despite repeated requests by Horizon. The continued failure of the City to allow Horizon to fuel its own aircraft led Horizon to employ a Kansas City attorney who met with the City representatives in May 1973, in the course of which a regional attorney of the FAA, who was contacted by telephone, advised the City representatives that Horizon had the right to fuel, but the right continued to be denied. This then led to the filing of a complaint with the FAA which held a meeting on the matter on July 31, 1973. As a result of that meeting and FAA regulations, the City then acquiesced and permitted Horizon to do so.

23. When the City solicited proposals for a fixed base operator, including the pumping of gasoline for the City, the Horizon proposal, which was to pump for a fee of five cents per gallon, was rejected in favor of that of Skyline (Glaspie) for ten cents. While the initial award to Skyline in April was subsequently rescinded, apparently as the result of a suit filed by Horizon against the City, the matter was still pending as this record was closed.

24. *Unicom Application:* When it became apparent the Flight Service Station was going to be closed despite vigorous local efforts, and in order to provide continuity, Horizon trained its personnel in weather reporting and filed its present Unicom application with the FCC on March 26, 1973. In response to its notification of the City and other interested parties, Horizon received a letter from the City advising that Horizon had no right to apply as the City intended to do so in the future. Also, the City Manager called Dr. Barber indicating the City looked with disfavor on the Horizon Unicom application and would oppose it, and apply for the license for the City.

25. *Weather Service:* Horizon trained and qualified one of its employees in weather observation and, following the closing of the FAA Flight Service Station, made the observations and provided them free of charge for about three weeks, at which time the City took over the observations. While Horizon applied to the National Weather Service prior to the City, the latter's application was accepted. The City makes the observations with its own employees and, under an informal arrangement, by Dale Glaspie who is compensated on a per-reading basis.

26. *Unicom Antenna:* Upon instituting its Unicom service April 29, 1973 under temporary authorization, Horizon used a rabbit-ear antenna in the false ceiling of the terminal building. Deeming the antenna inadequate due to the receipt of indirect complaints of lack of signal strength, Horizon sought approval of the City to erect a permanent

antenna on June 21, 1973, such permission being required before any holes could be made in the structure; in eight or nine days, the City requested a copy of the FCC temporary Unicom authority, which was supplied on July 2, 1973.

27. Shortly prior to July 31, 1973, Gary Lewis, Assistant Manager of Horizon, wishing to improve the quality of transmission, moved the antenna to the roof of the terminal building and avoided drilling holes in the wall by running the lead-in through the window and a drain pipe. Seeing the antenna in place, the Airport administrator deemed there was no emergency need for action on Horizon's request, and thereafter conducted an "investigation," consisting of looking at it several times, before finally approving the June 21, 1973 request on August 21, 1973.

28. *Present Unicom Service:* The City presented testimony of four small plane pilots using the Airport who complained of the service rendered since April 1973 by Horizon under its temporary authorization for Unicom.

29. Dale Glaspie, owner of Skyline Aviation, who operates a flight school and an air taxi service in competition with Horizon, is the local member of the FAA Accident Prevention Safety Council and in that capacity looks for unsafe activity at the Airport and advises or counsels on better ways of performance. He is of the view that the present service is inadequate and attributes a number of near-accidents at the field to the inability of the planes to make contact with Horizon on the Unicom. Prior to three or four weeks before the hearing, Glaspie was never able to get a Unicom response and on a recent occasion the wrong landing strip was given. He has informed Horizon employees the Unicom could be better and the advisories better, but has never informed them of failures to contact. He has never discussed the matter with Dr. Barber nor submitted written reports to either the FAA or FCC. He had made telephonic reports to the latter two agencies and was told by the FCC man to take the matter up with Dr. Barber but did not do so.

30. Another pilot, who was employed by Skyline Aviation as a lineman (gasoline loader) and weather observer, and is now employed as a lineman by the City, recently failed to get a Unicom response at 4:30 p.m. upon taking off and again on his return 20 minutes later; on other occasions while monitoring Unicom from another building he observed two planes which attempted to contact Unicom without results. Pilots sometimes complain to him about Unicom on the erroneous assumption he was the operator. He has discussed this situation in a general way with Horizon employees but not with Dr. Barber.

31. Another pilot, employed by Skyline as flight instructor and charter pilot, reported 95% failure to make Unicom contact, reduced recently to 60%. He finds this has required him to modify his flying habits and student instruction. He no longer attempts to contact Unicom at Kirksville but gets very good response at the Chillicothe Unicom.

32. A self-employed farmer, who pilots his own plane for both business and pleasure, rents hangar space from Glaspie, formerly leased his plane to him, and is a student pilot of his. He has had 90% failure to get Unicom in June and July 1973, apparently prior to the

erection by Horizon of its outdoor antenna. At other airports similar to Kirksville, he generally receives answers on Unicom.

33. Several witnesses offered by Horizon reported contrary experience in Unicom reception at the Airport. A dentist, associated with Dr. Barber, who flies his own private plane, has used the Airport for about two years. Prior to its closing, he utilized the Flight Service Station facilities, but since that time he has used Horizon's Unicom. Most of his flying is done after five o'clock and he does not attempt to contact Unicom but broadcasts his plans directly to other air traffic but on a few occasions he has been answered by Unicom. His experience at other comparable airports includes Moberly and Chillicothe, and he has never been answered at the latter. He has heard of no complaints as to Horizon's Unicom service.

34. An osteopathic physician, who pilots his own aircraft, has been successful in using the Horizon Unicom service since April 1973, and finds its service about the same as at other airfields having Unicom.

35. A quarry operator, who owns his own twin-engine plane which he formerly leased to Horizon, has utilized the Unicom service at the Airport. When the Flight Service Station was first closed, he had difficulty with Unicom in that he could hear them talking but couldn't understand them due to poor transmission and did not always get an answer, but now gets a good signal. In his experience at other airports with Unicom facilities, if he gets a 50% response he is surprised. In flying in and out of Jefferson City, for example, he sometimes gets an answer and sometimes not.

36. According to the Assistant Manager of Horizon, in charge of the Unicom, the service is provided on an intermittent basis from 6:00 to 9:00 a.m. and substantially constant from 9:00 a.m. to 5:30 p.m. Not all planes communicate directly with Unicom but broadcast to the traffic in the area. There are sometimes brief periods when the set is not monitored, but while he has received complaints as to quality of transmission he has never had complaints of failure of service. Initially, while its temporary antenna was in use, its signal could not be read for any substantial distance. This led him to institute steps to place a permanent antenna as discussed above.

Issues (6) and (7)—Proposed Radio Systems

37. Each applicant proposes an adequate Unicom transmitter. Neither proposes dispatch points, but each agrees to provide one to the other if successful.

CONCLUSIONS

Issue (1)—Location of Proposed Stations

1. The initial location of the City's Unicom would be near the north end of the main runway where it would command a view of the entire runway and the south approach, but not the north approach. Horizon's present site is on the east side of the main runway at its midpoint. At such time as it might obtain hangar space it would relocate there, at a point near the future site of the City's proposed Unicom when the planned hangar is constructed.

2. The Bureau contends that Horizon has established a clear preference over the City, which is also conceded by the City. The City

suggests, however, that each proposed present location be found to be adequate. With regard to ultimate future location, after construction of a fire station and hangar, each applicant will be in substantially the same locality, although the City contends its location will be superior.

3. In view of the uncertainty as to when the future construction might be accomplished, the comparison must be based on the present and near future. Thus, Horizon has the preferred site, in view of the failure of the City's to afford a view of the north approach.

Issue (2)—Hours of Operation

4. Each applicant initially proposes to operate on a 24-hour basis. Horizon expects to reduce service in the off-hours, however, if not justified by the availability of traffic or of operating personnel and the hangar space it seeks must become available. Likewise, the Airport administrator indicated that certain employees and schedules would be required "if" they operate on a 24-hour basis and the latter type operation will only be conducted if approved by the City Council.

5. Accordingly, it is concluded that each applicant is in substantially identical positions with regard to hours of operation.

Issues (3) and (4)—Availability of Experienced Personnel

6. Neither the Airport administrator nor any of the City employees are experienced in aviation or aviation communications, whereas those of Horizon are.

Issues (5) and (7)

7. Horizon's service since April 1973, rendered under temporary license, was criticized by a number of witnesses called by the City. Certainly until July 29, 1973,[4] the quality of transmission was poor due to an inadequate antenna, and for this the City must assume responsibility for its failure to act on Horizon's request. While some of the complaints specified incidents happening in the short interval since that date, it is noted that the complainers never advised Horizon of any failures but discussed only quality. Moreover, all complainers were employees of, or having connections with Dale Glaspie, who, as safety advisor, did not inform Dr. Barber of any failures and did not submit written reports to either the FAA or FCC. As noted below, Glaspie has enjoyed special status with the City in its Airport operations and would do so in the future if the license were granted to the City.

8. Accordingly, it is concluded that shortcomings of Horizon's Unicom service in the past are no indication it would fail to provide adequate service in the future.

9. *Alleged Discrimination:* While the City contends it will render service to all on a non-discriminatory basis, the history of its dealings with Horizon and with Glaspie cast serious doubts on its ability in this regard.

10. As owner and operator of the Airport, the City understandably takes a strong proprietary interest in all phases of its operation.

[4] The Airport administrator testified he first noted the outside antenna on July 31, 1973. Witness Gary Lewis testified he erected it on a Sunday and it is therefore assumed to have been done on July 29, 1973, the Sunday prior to July 31.

For reasons not apparent of record, however, it exercises that interest in a manner which would deprive Horizon of opportunity to perform services and place them in the hands of its competitor, Glaspie (Skyline). While the City generally contends that governmental operation would be preferable to a corporation interested in a profit, its actions disclosed in this record leave doubt as to its objective.

11. Horizon for a short period made the required weather observations for the City at no charge; the City assumed the role itself, and now pays Glaspie to make part of them. Horizon was unable to obtain terminal space for over five months although offering to pay rent, while it was provided free to Glaspie. Horizon has been unable to obtain adequate hangar space while apparently Glaspie already occupies sufficient space. When bids were solicited for the fixed base operator, the City accepted Glaspie's proposal on the date of submission at double the cost to the City of delivering gasoline than that proposed by Horizon, even though all other terms were the same, so far as the record discloses. Moreover, if the award of the fixed base operator contract, now in dispute in court, is eventually upheld, it is apparently the intent of both Glaspie and the City, that if the license herein is granted to the City the operation will be contracted to Glaspie. Finally, the City prevented Horizon from fueling its own planes, even though its contract and FAA regulations required it and was only acceded to by the City after complaint to the FAA.

12. While the City has not advised Horizon why its fixed base operator bid has been rejected, the City contends this was done for a twofold reason: (1) inadequate financial showing, and (2) lack of detailed plans and specifications for the construction of a hangar. With regard to (1), the record shows that in response to "2. A balance sheet showing the personal worth or financial capabilities of the applicant" Dr. Barber submitted a statement by a CPA that Dr. Barber and his associate had supplied information that their combined net worth amounted to $550,000.00. With regard to (2), Dr. Barber stated he would "construct the necessary hangar in the appropriate manner." The basis for the rejection of the bid is accordingly not apparent.

13. It accordingly is reluctantly concluded that, for whatever reason, the City has flagrantly discriminated against Horizon in the operation of the Airport, and, as a concomitant, preferred Glaspie. It follows that it cannot be concluded, on this record, that it can be expected that the City will provide Unicom service on an impartial and non-discriminatory basis or that the service would be available to Horizon, a fixed base operator. On the other hand, there is no suggestion that Horizon's service has been discriminatory.

14. The Bureau urges that on the basis of Issues (1), (2), (3), and (4), license should be awarded to Horizon. As noted above, its basic contention is that the evidence with respect to alleged discrimination should not have been received under Issue (5) as framed. It suggests that if the Presiding Judge finds evidence of record supporting a finding of present or potential discrimination, it should be weighed appropriately.

15. It is accordingly concluded that the public interest would best be served by the granting of the application of Horizon and denying that of the City.

IT IS ORDERED, That, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Rules, the application of Horizon Airways, Inc. (File No. 43–A–L–43) IS GRANTED and the application of City of Kirksville (File No. 117–A–L–53) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
FREDERICK W. DENNISTON,
Administrative Law Judge.

FCC 74-347

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 87 OF THE RULES TO PERMIT LESS CRITICAL FREQUENCY TOLERANCE FOR SINGLE-SIDEBAND OPERATIONS BY CIVIL AIR PATROL STATIONS	RM 2248

ORDER

(Adopted April 9, 1974; Released April 16, 1974)

BY THE COMMISSION:

1. The Civil Air Patrol (CAP), a civilian auxiliary of the United States Air Force, has filed a petition for rule changes to provide relief from the frequency stability required for single sideband (SSB) operations by CAP mobile stations on frequencies below 25 MHz. These stations are now assigned government frequencies in the 2 and 4 MHz bands. Petitioner requested that it be required only to maintain the carrier frequency in these operations to within 100 Hz.

2. In the Order on RM 1177 (FCC 68-626, released June 14, 1968), the Commission specified that the frequency stability for all CAP stations be within 50 Hz until January 1, 1973.

3. CAP makes the following statements in support of its petition:

(a) No SSB equipment of recent design has been obtainable from DOD excess sources. Consequently, most of the equipment in use has been purchased by individual volunteers and leased to the CAP at no cost for licensing and control purposes. Out of a total of 4000 CAP stations, 2500 are mobile stations.

(b) Frequency stability tests conducted show frequency drifts of 42 Hz to 83 Hz. The land stations are able to maintain the 50 Hz tolerance by turning on the equipment well in advance of scheduled net activities; however, warm-up periods of such length are impracticable in mobile operations. Space in mobile transmitters is at a premium, particularly near the frequency controlling elements, and would not permit installation of crystal ovens without elimination of adjacent channel capabilities in addition to the installation costs of crystal ovens and oven type crystals.

(c) Permitting frequency tolerances of 100 Hz will still permit understandable communications between mobile—mobile and mobile-land stations in the CAP network and will not interfere with other licensees.

4. The present amendment grants the petitioners' request without affecting users of the adjacent radio spectrum since CAP stations operate a closed system using government frequencies and where any adverse consequences from this action would only affect CAP stations and no other users for whom the Commission has regulating responsibility. We do not believe that the public interest would be served by denying the applicant's request for rule changes in this instance in view of CAP's contribution during emergency and search and rescue missions.

5. The amendment proposed herein pertains to the use of government frequencies used only by the petitioner or the government agencies to which the frequencies are assigned. Since users of other frequencies are not affected, proposed rule making and effective date procedures would serve no purpose and are not required pursuant to 5 U.S.C. Section 553.

6. In view of the foregoing, IT IS ORDERED, That pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, Part 87 of the Commission's rules is AMENDED, effective April 23, 1974, as set forth in the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Part 87 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 87.65(c) is amended to read as follows:

§ 87.65 Frequency stability

* * * * * * *

(c) When transmitting single sideband emission, the carrier frequency shall be maintained within the applicable following number of cycles per second of the specified carrier frequency:

(1) For other than Civil Air Patrol Stations:

	Hertz
(i) All ground stations	10
(ii) All aircraft stations	20
(2) For Civil Air Patrol Stations:	
(i) All land stations	50
(ii) All mobile stations	[1] 50

[1] Mobile CAP stations, either on aircraft or in vehicles, authorized prior to January 1, 1978, with equipment having a frequency stability of 100 Hz, may continue to use such equipment until January 1, 1983.

* * * * * * *

FCC 74-354

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

STATEMENT OF POLICY CONCERNING PROCEDURES APPLICABLE TO COMSAT'S APPLYING FOR COMMISSION AUTHORIZATION TO PARTICIPATE IN CERTAIN INTELSAT ACTIVITIES

(Adopted April 9, 1974; Released April 11, 1974)

BY THE COMMISSION:

The Communications Satellite Corporation (Comsat), was created purusant to the provisions of the Communications Satellite Act of 1962 (Satellite Act) to serve as the United States participant in the creation and operation of the global commercial communications satellite system contemplated by that Act. Comsat, as the United States Signatory to the operating agreement of the International Telecommunications Satellite Organization (INTELSAT), is a member of the Board of Governors of INTELSAT and discharges certain of its functions in that respect in accordance with instructions from the United States Government.[1] In addition to, and apart from, the general governmental instructional process, Comsat, as a communications common carrier, must secure authorization from the Commission pursuant to the Communications Act of 1934 and the Satellite Act before it may participate in certain INTELSAT activities. Experience has demonstrated the necessity for supplementing existing procedures by establishing more definite guidelines for securing such authorizations.

The global communications satellite system has now been established and the Definitive Arrangements for INTELSAT have recently come into effect. The Commission believes that it is now appropriate to set forth specific procedures to be followed in those instances where Comsat is required by statute to obtain authorizations from the Commission to participate in the construction or operation of INTELSAT satellite facilities.[2] These procedures are designed to provide opportunity for comment by interested parties, to encourage efficiency, and to promote the public interest. They are comparable to those applicable to the authorization of other types of communications facilities. The Commission recognizes, of course, that there are certain additional factors which must be taken into account with respect to Comsat in connection with these procedures in view of its role in INTELSAT and the role assigned to the Executive Branch under the provisions of Section 201(a) of the Satellite Act.

To achieve the foregoing objectives, the Commission will require Comsat, in those cases where Commission authorization is necessary,

[1] Such instructions are issued by the Department of State (DOS) pursuant to determinations mutually arrived at in coordination with the Office of Telecommunications Policy (OTP) and the Federal Communications Commission (Commission).

[2] Specifically, these procedures are applicable to authorizations required pursuant to Title III and Section 214 of the Communications Act and Section 201(c) of the Satellite Act.

to submit applications for the necessary authority prior to the time such matters are considered by the Board of Governors of INTELSAT. Such applications will be submitted and considered under the applicable procedures, timetables and criteria of the Communications Act, the Communications Satellite Act, applicable Commission Rules and Regulations, and as supplemented herein. This procedure will provide interested parties with the opportunity to present their views on such applications to the Commission, and is designed to afford the Commission time to consider fully Comsat's applications and all filings with respect thereto prior to the time the matter is presented to the Board of Governors for action. Specifically, Comsat will be required to submit applications for such authority as may be required at the earliest practicable date after the proposed facilities or operational programs have become defined to the point where specific designs, operational configurations, services and service dates are under review and there is a reasonable probability that a proposal will be presented to the Board of Governors for consideration. In many cases an appropriate time for filing an application may well be shortly after release of the request for proposals (RFP) for facilities and/or services that would be required should the Board at a later date adopt a specific proposal relating to the construction of new or modified facilities or services. Where such proposals, if adopted by INTELSAT, would involve a substantial investment by Comsat, the most comprehensive review will be required, and it is expected that applications will be filed by Comsat well in advance of the date the Board may take final action on the matter.[3] Although all technical, operational, financial and other details of the final proposal may not be known with precision when the initial application is filed, Comsat will be expected to file promptly appropriate modifications to its applications reflecting any significant changes or additions and, in any event, at least 60 days before anticipated Board action.[4] With regard to Comsat's participation in other INTELSAT activities requiring Commission authorization, Comsat will be required to submit appropriate applications no later than 60 days prior to anticipated action on the proposed item by the Board.[5] Such applications would include, but are not limited to, requests to participate in the launch, testing and use by Comsat of INTELSAT satellites; and modifications not involv-

[3] Time must be available for interested parties to submit comments, and for the Commission to properly consider the need for, and value of, additional or new facilities, the feasibility of alternative proposals, and to conduct a hearing if it so determines that one is warranted. Public notice will be given by the Commission of acceptance for filing of Comsat's applications and major amendments with respect thereto. Such applications and amendments, as well as supporting documents, will be available for public inspection unless the Commission determines otherwise for good cause shown.

[4] Prior to the filing of an initial application, Comsat will be expected to keep the Commission fully and promptly informed on a continuing basis concerning those programs which INTELSAT has under consideration or study which relate to new or modified satellite facilities and for which documentation has been made available to Comsat as U.S. Signatory. This should include relevant technical and economic information and supporting arguments with respect to all alternatives being considered for such programs. When considered necessary, the Commission may take appropriate steps to keep interested parties advised during this pre-application period.

[5] When factors beyond the control of Comsat make it impossible to submit such an application or a major amendment by the specified 60-day deadline, Comsat should notify the Commission as soon as it becomes aware of such conditions, and the Commission will, upon a proper showing by Comsat, consider expedited procedures geared to the particular circumstances which do not deprive interested parties of an opportunity for meaningful comment. In any event, however, Comsat will be required to submit such completed applications no later than 30 days prior to anticipated action by the Board.

ing substantial investment by Comsat to on-going INTELSAT programs for which Comsat's participation has been authorized.

Upon reaching its determination on Comsat applications, the Commission will notify the Department of State accordingly. The timing and method of release of the Commission decision to interested parties and/or the general public will be decided after consultation with the Department of State on a case-by-case basis, taking into consideration all relevant factors including foreign policy considerations.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R-142

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of DAVID ORTIZ RADIO CORP., CABO ROJO, P.R.	Docket No. 19920 File No. BPH-8236
SOUTHWESTERN BROADCASTING CORP., HORMIGUEROS, P.R.	Docket No. 19921 File No. BPH-8333
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released April 19, 1974)

BY THE REVIEW BOARD:

1. The above-captioned mutually exclusive applications were designated for hearing by Order of the Chief of the Broadcast Bureau, 39 FR 2799, published January 24, 1974. Now before the Review Board is a motion to enlarge issues, filed on February 11, 1974, by David Ortiz Radio Corporation (hereinafter Ortiz), requesting Suburban Community and financial issues against Southwestern Broadcasting Corporation (hereinafter Southwestern).[1]

2. *Suburban Community Issue.* Pursuant to Section 73.203(b) of the Commission's Rules, Southwestern has applied for authority to construct an FM broadcast facility at Hormigueros, Puerto Rico, on FM Channel 221, assigned to Cabo Rojo, Puerto Rico.[2] In support of its request for a Suburban Community issue, Ortiz alleges the following facts: (a) Southwestern's 3.16 mv/m contour will provide complete coverage to Mayaguez, Puerto Rico[3] (1970 population of 68,872),[4] the third largest city in Puerto Rico, and located only three miles from Southwestern's proposed community of license, Hormigueros, Puerto Rico (1970 population of 6,531);[5] (b) Southwestern's proposed transmitter site, located north of Hormigueros, is closer to the larger community of Mayaguez; and (c) with at least part of the University of Puerto Rico located in Mayaguez, coupled with the labor force which commutes from Hormigueros to Mayaguez, the larger

[1] The Board also has before it for consideration the following related pleadings: (a) motion for late acceptance, filed February 11, 1974, by Ortiz; (b) opposition, filed February 26, 1974, by the Broadcast Bureau; (c) opposition, filed March 5, 1974, by Southwestern; and (d) reply, filed March 15, 1974, by Ortiz. Petitioner has shown good cause for its one-day delay in filing due to a Washington snowstorm and its motion for late acceptance will therefore be granted.

[2] Section 73.203(b) permits an applicant to apply for a channel assigned to a community listed in the Table of Assignments in any unlisted community if the channel requested is a Class A channel and within 10 miles of the listed community.

[3] Although the applicants differ in their method of determining the extent of 3.16 mv/m coverage of Mayaguez, there is no dispute that Southwestern's proposed 3.16 mv/m contour will encompass most of the city of Mayaguez.

[4] Petitioner erroneously alleged that Mayaguez city had a 1970 population of 85,857.

[5] In its reply, Southwestern points out that in the 1970 census, Hormigueros was added to the Mayaguez Standard Metropolitan Statistical Area (SMSA).

community is the social, economic and educational center for the surrounding areas.[6] Petitioner cites *Amendment of Part 0 of the Commission's Rules*, FCC 73–1123, released November 9, 1973; *Berwick Broadcasting Corporation*, 12 FCC 2d 8, 12 RR 2d 665 (1965); *WMID, Inc.*, FCC 68R–257, 13 FCC 2d 412; *Christian Voice of Central Ohio*, 15 FCC 2d 308, 14 RR 2d 791 (1968); and *Brinsfield Broadcasting Company*, 21 FCC 2d 707, 18 RR 2d 526 (1970), in support of its request.

3. Although the public interest considerations underlying the "Policy Statement"[7] are applicable to an FM applicant,[8] the Board has made it clear that location within an urbanized area, proximity to a larger community, and signal penetration, standing alone, are insufficient to raise a Suburban Community question in an FM proceeding. See *Almardon Incorporated of Florida*, 16 FCC 2d 395, 15 RR 2d 600 (1969). In the instant case, petitioner merely relies on the proximate location of Hormingueros and Mayaguez, its inclusion in the Mayaguez SMSA, and the placement of a 3.16 mv/m signal over the larger city to support its motion to enlarge issues.[9] Although Ortiz alleges that Hormigueros is educationally, socially and economically dependent on Mayaguez, its allegations are bare assertions and do not comply with the support requirement of Section 1.229(c) of the Commission's Rules. Nor do we agree with petitioner's assertion that the precedent it relies on compels addition of the requested issue. In *Berwick, supra*, where the above factors were all relevant considerations, the applicant, against whom the Suburban Community issue was sought, also owned an AM facility in the larger neighboring community; intended to utilize its AM personnel in operating the proposed FM station; and proposed to duplicate some of its programming. Collectively, these factors raised a substantial question of whether the applicant intended to operate as a local transmission service for its proposed community of license.[10] In *Christian Voice of Central Ohio, supra*, the applicant conceded that it intended to serve the larger community and its surrounding area; and in *Brinsfield Broadcasting Co., supra*, the applicant's proposed service area covered much of the larger community of Kansas City, Missouri, notwithstanding the Commission's explicit language that the assigned channel was not to be used to provide an additional service to Kansas City. These significant factual circumstances are not present here, however, and, therefore, the Board will deny petitioner's request for a Suburban Community issue.

4. *Financial Issue.* In support of its request, Ortiz alleges that Southwestern has insufficient funds to meet its first year cost of construction

[6] Petitioner also alleges that a grant of Southwestern's proposal would provide Mayaguez with a tenth aural transmission service.

[7] *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 6 RR 2d 1901 (1965).

[8] See *Berwick Broadcasting Corporation, supra; Christian Voice of Central Ohio, supra;* and *Brinsfield Broadcasting Company, supra.*

[9] Although Ortiz alleges that Southwestern's transmitter site will be located closer to Mayaguez, we agree with the Bureau that this allegation is erroneous.

[10] We made it clear in *Berwick*, however, that unlike an applicant for an AM facility, the Board would not apply the presumption established in the "Policy Statement" since an FM applicant is, in most circumstances, precluded from amending its application to specify the larger community even if it meets the technical requirements of the larger community. Such an amendment could not be permitted here since Mayaguez is not an unlisted community within 10 miles of Cabo Rojo (see Section 73.203 of the rules).

and operation estimated at $42,035. To meet its costs, Southwestern shows $43,605 in available funds for its first year cost of construction and operation: (a) $980 in cash; (b) $22,625 from a proposed bank loan; and (c) $20,000 in an escrow deposit. Ortiz alleges, however, that the applicant's balance sheet reflects current assets of $980 in cash and $18,899 in accounts receivable, but that the accounts receivable cannot be relied upon since they have not been "aged" collectible and therefore do not offset Southwestern's current liabilities of $11,592. This, argues petitioner, reflects a liquid deficit of $10,610.[11]

5. The Board agrees with both Southwestern and the Bureau that a financial issue is not warranted. Since the applicant corporation has been operating with a deficit in 1971 and 1972, and in light of its stated intention not to rely on corporate funds to construct and operate the proposed station, we agree with the Bureau that the corporation's cash asset of $980 should not be considered in evaluating its financial capabilities. However, even without relying on its corporate assets, the applicant has available a bank loan commitment for $22,625 and an escrow deposit of $20,000, totalling $42,625, to meet its estimated first year costs of $42,035. In addition, the applicant has funds accruing from the interest on its escrow deposit. Although Southwestern has not shown that its accounts receivable are "aged" and liquid, its current assets do exceed its current liabilities and we, therefore, agree with Southwestern that the funds earmarked for its proposed radio station will be available for its first year costs of construction and operation of the proposed station.

6. Accordingly, IT IS ORDERED, That the motion for late acceptance, filed on February 11, 1974, by David Ortiz Radio Corporation, IS GRANTED; and

7. IT IS FURTHER ORDERED, That the motion to enlarge issues, filed on February 11, 1974, by David Ortiz Radio Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[11] The liquid deficit should be $10,612. Ortiz also points out that Southwestern reported a deficit in its operations for 1971 and 1972.

FCC 74-364

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (RED OAK, IOWA)	Docket No. 19937 RM-2119

REPORT AND ORDER

(Adopted April 9, 1974; Released April 16, 1974)

BY THE COMMISSION:

1. On February 13, 1974, the Commission issued a Notice of Proposed Rule Making, 39 Fed. Reg. 7181, in the above-entitled matter, in a petition by Red Oak Broadcasting Co., Inc., proposing the assignment of FM Channel 249A to Red Oak, Iowa, by reassigning this channel from Nebraska City, Nebraska, to Red Oak, Iowa. Channel 249A was assigned to Nebraska City in 1963 but never occupied. No replacement for the Nebraska City Channel 249A assignment, the only FM channel there assigned, was proposed. Brief supporting comments were filed by the petitioner which incorporate its prior petition on the proposal and reaffirm that it intends to apply therefor and build the station if authorized. Comments opposing the proposal were filed by The KNCY Radio Corporation, licensee of daytime-only AM Station KNCY, Nebraska City, Nebraska (KNCY Radio) which informs that it has already taken steps looking toward the preparation and filing of an application for Channel 249A in Nebraska City. It further states that prior to the release of the Notice of Proposed Rule Making it consulted with its communications counsel about the manner of conducting surveys and various aspects relating to the preparation of the FM application.

2. Nebraska City (population 7,441)[1] is the seat of Otoe County (population 15,576), and is located approximately 40 miles from Omaha. Red Oak, Iowa (population 6,210), is the seat of Montgomery County (population 12,781) and is located approximately 40 miles from Omaha. While both communities are without an FM outlet, each has a local AM radio station (daytime only).

3. KNCY Radio in opposition contends that the petitioner's case for moving 249A from Nebraska City, Nebraska, to Red Oak, Iowa, rests on the fact that the proposed assignment will provide a first FM service to portions of Montgomery County, as well as provide a first FM service to Red Oak, Iowa. Opponents points out that two fulltime AM stations (KFNJ and KMA) licensed to Shenandoah, Iowa, located approximately 20 miles from Red Oak provide in-state service

[1] All population figures are taken from the 1970 U.S. Census unless otherwise indicated.

to Red Oak and in addition there is a daytime-only station (KJAN) and a fulltime FM station (KJAN–FM), licensed to Atlantic, Iowa, located approximately 30 miles from Red Oak. Opponent contends that Nebraska City is the larger community; that there is now a demand for the use of the channel at Nebraska City and prospect for Nebraska City and Otoe County to have a first local FM service as evidenced by the application now under preparation.

4. While Nebraska City would normally warrant a first FM assignment over Red Oak on the basis of size, we felt it would be in the public interest to consider the petitioner's proposal in rule making, considering that Channel 249A has been assigned to Nebraska City since 1963 and that there still appeared no evidence of any interest in using the channel for a local FM service there. We now believe, however, in view of this record and the steps taken by The KNCY Radio Corporation in preparation for the Nebraska City Channel 249A assignment which clearly demonstrate an interest in using this assignment at Nebraska City, that our assignment objectives and the public interest are best served by retaining the channel in the larger community of Nebraska City at this time. Should it later appear, however, that there is undue delay in activating the channel at Nebraska City because of lack of diligence in prosecuting an application for the channel or in building an authorized station, we would consider a further petition to move the channel to Red Oak, Iowa to serve a need there.

5. IT IS ORDERED, that the proposal in this proceeding to assign Channel 249A to Red Oak, Iowa, by deleting it from Nebraska City, Nebraska, IS DENIED without prejudice to the filing of a future request to assign a channel to Red Oak consistent with applicable Commission requirements.

6. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-349

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 2 AND 5 OF THE COMMISSION'S RULES AND REGULATIONS TO PROVIDE FOR THE USE OF FREQUENCIES IN THE BANDS 40.66–40.70 AND 216–220 MHz FOR THE TRACKING OF, AND TELEMETERING OF SCIENTIFIC DATA FROM, OCEAN BUOYS AND ANIMAL WILDLIFE	Docket No. 20004

NOTICE OF PROPOSED RULEMAKING

(Adopted April 9, 1974; Released April 16, 1974)

BY THE COMMISSION:

1. Notice is hereby given of proposed rule making in the above captioned matter.

2. Through recent meetings and correspondence with representatives of the Committee on Radio Frequencies of the National Academy of Sciences (CORF) and with other Government agencies, the Commission has become aware of an increasing need for the use of radio for telemetering and tracking purposes in connection with scientific studies in the fields of wildlife biology and oceanography. Wildlife telemetering operations are conducted primarily by biologists and physiologists using remote observation techniques in the study of animal behavior. To study the migratory habits of animals and birds, small, lightweight, low powered transmitters using printed circuit construction are fastened to the specimen by any of several means. After tuning to the specific frequency, the researcher uses portable direction finding equipment to accurately track the movements of the animal or bird. Oceanographers studying the seas and marine life employ small scientific buoys. These inexpensive scientific instruments are allowed to drift and are used in substantial numbers to measure and record such data as salinity, current speed, temperatures, sea state, etc. After the data has been collected, a radio beacon is required to locate the buoy. The Commission has been informed by the CORF that other methods of locating the buoys not using radio techniques have been tried. These other methods include flashing lights and flags, but the recovery rate using these techniques has been low. In addition to the use of radio for locating the buoys, small quantities of data may be transmitted from the buoy using sub-carrier frequency modulation or pulse-position modulation.

3. Presently, such operations are being carried out under authority of Part 15 of the Commission's Rules or on a licensed basis in the Experimental (Research) Radio Service under Part 5. Frequencies em-

ployed for these operations vary widely as do equipment capabilities and costs. This situation has apparently led to considerable confusion among potential users concerning applicable frequencies and regulations and may have resulted in some operations in unauthorized bands. This latter problem could be particularly serious because of the difficulty of identifying and controlling interference from transmitters which may be attached to wildlife, including birds in flight.

4. In response to this problem, the CORF requested that two frequency bands be specifically designated for scientific telemetering and tracking: a 10–15 kHz band below 180 MHz and a 20–30 kHz band above 180 MHz. Relatively low transmitter power output levels of 10 milliwatts from ocean buoy transmitters and 1 milliwatt from wildlife transmitters were recommended by the CORF. Designating specific bands for such use would help to minimize the risk of interference in other bands, assist the scientific community in its planning efforts and serve as a guide for the future design and development of equipment.

5. The CORF proposals were coordinated with the Interdepartment Radio Advisory Committee (IRAC) to determine if Government agencies have similar requirements to those expressed by CORF and, if so, to propose a joint frequency provision for both Government and non-Government use. A sub-group of the IRAC was established to deal with this question and its recommendations were subsequently forwarded to the Commission. The bands 40.66–40.70 MHz and 216–220 MHz, both of which are primarily Government bands, were recommended by the IRAC group with the stipulations, however, that the new operations be secondary to other Government use of the bands, that licensing be required in lieu of Part 15 operation, and that all applications be coordinated through the normal FCC/IRAC mechanism to minimize the risk of interference to Government stations. Other recommendations of the group included a limitation on power output to 10 mw for wildlife applications and 100 mw for ocean buoys; restriction of modulation types to A0, A1, A2, F1, or F2; specification of authorized bandwidth of emission not to exceed 1 kHz; and the requirement for equipment type acceptance.

6. From an administrative viewpoint, it appears appropriate to continue to license such scientific operations in the Experimental (Research) Radio Services under Part 5 of the Rules. Whereas the general frequency provision under Part 5 is very broad, we would add a footnote to § 5.202(d) containing the substance of the IRAC recommendations and stating that frequencies in the bands 40.66–40.70 MHz and 216–220 MHz, should be used for these operations to the extent practicable. An appropriate US footnote would be added to the Table of Frequency Allocations in Part 2. The text of the proposed footnotes and the necessary changes to the Table are reflected in the appendix hereto. These amendments, we believe, would satisfy the needs of the scientific community and at the same time insure adequate safeguards for the other users of these bands. It should be pointed out that, while we are not proposing a Part 15 provision [1] as preferred

[1] Action taken herein will not preclude the operation of such devices on a non-licensed basis to the extent presently permitted under Part 15 of the Rules.

by the CORF, the designation of specific bands will simplify and expedite the frequency coordination process required under Part 5.

7. As indicated above, the proposed telemetering and tracking operations will be secondary to other services in the bands in question. In the 40.66–40.70 MHz band, such operations would be subject to receiving interference from the operation of industrial, scientific and medical equipment as well as from Government stations. However, because most wildlife and oceanographic research operations contemplated by this action are conducted either at sea or in remote areas, interference from ISM equipment concentrated in built-up areas is not expected to be a serious problem. In the 216–220 MHz band, scientific tracking and telemetering would be secondary to Government stations and to any non-Government stations authorized in accordance with footnote US 114 to the allocation table.

8. This proposal to amend the Commission's Rules is issued under authority contained in Sections 4(i) and 303(c) and 303(r) of the Communications Act of 1934, as amended.

9. Pursuant to Section 1.415 of the Commission's Rules, comments in support of, or in opposition to, the proposed amendment may be filed on or before May 23, 1974. Reply comments may be filed on or before June 3, 1974. All relevant and timely filed comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision in this proceeding, the Commission may also take into account other relative information before it, in addition to the comments invited by this Notice.

10. In accordance with the provisions of Section 1.419(b) of the Commission's Rules, an original and fourteen copies of all statements, briefs, or comments filed shall be furnished the Commission.

11. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its Headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 2.106 is amended by adding a new footnote US ___ to the Table of Frequency Allocations as follows:

§ 2.106 Table of Frequency Allocations

United States	
Band (MHz) 5	Allocation 6
***	***
40–42 (236)	G, NG (US 94) (US_)
***	***
216–220	G, NG (US 114) (US_)

* * * * * * *

US ___ Use of frequencies in the bands 40.66–40.70 and 216–220 MHz may be authorized to Government and non-Government stations on a secondary basis for the tracking of, and telemetering of scientific data from, ocean buoys and wildlife. Modulation types will be limited to A0, A1, A2, F1 and F2; occupied bandwidth shall not exceed 1 kHz; and maximum transmitter output power shall not exceed 10 milliwatts for wildlife applications and 100 milliwatts for ocean buoys. Air-borne wildlife telemetry in the 216–220 MHz band will be limited to the 216.000–216.050 MHz portion of the band.

2. Section 5.203 is amended by adding a footnote as follows:

§ 5.203 Frequencies for Experimental Service (Research).

Stations operating in the Experimental Service (Research) may be authorized to use any Government or non-Government frequency designated in the Table of Frequency Allocations set forth in Part 2 of this chapter as available for assignment to this service: *Provided*, that the need for the specific frequency or frequencies requested is fully justified by the applicant.[1]

[1] Notwithstanding the broad frequency provision for this Service, applicants desiring authorization for the purpose of wildlife or ocean buoy telemetering and/or tracking should, to the extent practicable, use frequencies in the bands 40.66–40.70 MHz or 216–220 MHz, in accordance with footnote US ___ to the Table of Frequency Allocations, § 2.106 of this Chapter. Transmitters to be used in these bands for this purpose must be type accepted in accordance with the procedure set forth in § 2.571 of this Chapter.

FCC 74R-140

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of HERTZ BROADCASTING OF BIRMINGHAM, INC. (WENN AND WENN-FM), BIRMINGHAM, ALA. For Renewal of License	Docket No. 19874 File Nos. BR-2875, BRH-2454
JOHNSTON BROADCASTING CO. (WJLD AND WJLN(FM)), BIRMINGHAM, ALA. For Renewal of License	Docket No. 19875 File Nos. BR-1174, BRH-328, BRSCA-970

MEMORANDUM OPINION AND ORDER

(Adopted April 16, 1974; Released April 18, 1974)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK CONCURRING IN RESULT WITH STATEMENT. BOARD MEMBER BERKEMEYER ABSTAINING.

1. The Commission designated the applications of Hertz Broadcasting of Birmingham, Inc. (Hertz) and Johnston Broadcasting Company for hearing by Order and Notice of Apparent Liability, FCC 73-1195, 38 FR 33322, published December 3, 1972. On December 11, 1973, Citizens & Southern National Bank (Citizens) filed with the Presiding Judge in this proceeding a petition to intervene or petition for leave to intervene. Likewise, on December 20, 1973, another creditor of Hertz, First National Bank of Jackson (First National), filed a petition to intervene. The Presiding Judge denied Citizens' petition by Memorandum Opinion and Order, FCC 74M-2, released January 3, 1974, and First National's by Memorandum Opinion and Order, FCC 74M-94, released January 22, 1974. Employing essentially the same reasoning in denying both petitions, the Judge concluded that neither bank had a right to intervene pursuant to Rule 1.223(a) simply because it has a creditor relationship to the licensee. Such a relationship, he continued, would not necessarily raise a recognizable interest in the resolution of the issues under consideration here. The public interest cannot be made the instrumentality to serve the private interests of creditors, the Judge further concluded. The Judge denied Citizens' leave to intervene filed pursuant to Rule 1.223(b) on grounds that Citizens had not shown that its presence was necessary for a fair and just resolution of the issues. Presently before the Review Board are appeals by both banks from the adverse rulings of the Presiding Judge. Citizens filed its appeal on January 9, 1974, and First National

filed its on January 29, 1974.[1] Since both appeals raise essentially the same questions, we will consider them jointly.

2. In its appeal, Citizens first asserts that it was not afforded by the Presiding Judge the time allotted by Commission Rules 1.4 and 1.45 to file a reply pleading. The Judge released his Memorandum Opinion and Order a full week prior to the due date for replies, Citizens maintains;[2] thus, Citizens incorporates in the instant appeal the information it would have included in a reply pleading. As the pledgee of all of the outstanding stock of Hertz, Citizens argues that it could well become the sole stockholder of the corporate licensee in case of default. In fact, Citizens maintains, Hertz has failed to make payments as required on certain notes held by the bank; thus, under the cross-default provisions of the notes, the bank could demand full payment of the entire outstanding indebtedness of approximately $282,000.[3] In this event, Citizens asserts, it would become the sole stockholder and thus have a significant interest in prosecuting these applications to protect its substantial investment. Accordingly, Citizens requests leave to intervene so that it will be served with all necessary documents and have the right, should it become necessary, to continue the prosecution of the pending applications, in order to protect its investment in the challenged stations.

3. In its appeal, First National argues that it has a right to intervene pursuant to Rule 1.223(a) because: (1) it is the major creditor of Hertz for a debt of over $640,000; (2) its debt is secured by a lien on the licensee's broadcast assets; and (3) Hertz is in default and any attempt by the bank to compel payment of these obligations would be "virtually fruitless."[4] First National argues that the issue now before the Board is whether a creditor of a licensee is required, as the Presiding Judge held, to show that it is able to contribute relevant and material evidence to the proceeding in order to intervene by right. Because denial of the Hertz application would adversely affect its interests, First National submits, it should be allowed to participate in the proceeding.

4. The Review Board is of the view that both appeals should be denied. We agree with Citizens to the extent that it was error for the Presiding Judge to release his Memorandum Opinion and Order before the time had expired for the filing of reply pleadings; however, we disagree with the Broadcast Bureau that the matter should be remanded to the Presiding Judge to allow Citizens to file a reply. In its

[1] Also before the Review Board are the following related pleadings: Supplement to appeal from adverse ruling, filed January 11, 1974, by Citizens; Broadcast Bureau comments on Citizen's appeal, filed January 22, 1974; and Broadcast Bureau's opposition to First National's appeal, filed February 7, 1974.

[2] According to Citizens, Rule 1.45(b) provides for the filing of reply pleadings "within five days after the time for filing oppositions has expired." The time for filing oppositions was December 28, 1973; therefore, pursuant to the rule, reply pleadings were not required to be filed before January 11, 1974, Citizens continues. The Presiding Judge, however, issued his Memorandum Opinion and Order on January 3, 1974. Citizens attempts to expand upon this point in a supplement to its appeal; however, we will dismiss this pleading as unauthorized pursuant to Rule 1.45(c).

[3] In an attached affidavit from John Hansen, vice president of Citizens, it is stated that it is "highly likely" the bank will demand payment and move for appointment of a Receiver for the licensee "within the very near future."

[4] First National bases its claim on its status as trustee of a testamentary trust established by the 94.6% owner of the former licensee of Stations WENN and WENN-FM. As part of the consideration for sale of the stations, the former licensee obtained two promissory notes payable by Hertz which comprise the debt in question.

appeal, Citizens has set forth the information it would have incorporated in its reply pleading. That information is supplemental and in our view would not alter the Presiding Judge's reasoning or result. Moreover, the information is now before the Board and has received our full consideration, which is all Citizens is requesting in any case. As to the merits of the appeals, in our opinion, the Presiding Judge did not err in denying both banks permission to intervene as a matter of right in this proceeding. Commission Rule 1.223(a) specifies that only a party "who qualifies as a party-in-interest" may intervene by right. Although First National correctly urges that the test set forth in Section 402(a)(6) of the Act, *i.e.*, a person aggrieved or whose interests are adversely affected by grant or denial of the application, is appropriate for determining party-in-interest status,[5] we do not agree that appellants meet this test. They cite no precedent which supports their request,[6] and neither has shown that an adverse resolution of the proceeding, *i.e.*, denial of the Hertz application, would result in a loss of their investments or elimination of any recourse to them. Thus, we do not believe that appellants have shown a potential direct and substantial injury which could result from the outcome of this proceeding. *Cf. Minnesota Microwave Inc.*, FCC 64R–187, 2 RR 2d 269; and *Warsaw-Mount Olive Broadcasting Co.*, FCC 63R–154, 25 RR 177. All creditors of a corporation have an interest in its survival, but to grant each status as a party on those grounds alone, with the concomitant rights to submit evidence, and call and cross-examine witnesses would, in our view, render the hearing process too unwieldy. *Cf. National Broadcasting Co., Inc.* v. *FCC*, 132 F. 2d 545, aff'd., 319 U.S. 339 (1942).

5. Citizens also appeals the Presiding Judge's denial of its request for leave to intervene pursuant to Rule 1.223(b). However, one seeking discretionary intervention "must show how such petitioner's participation will assist the Commission in the determination of the issue in question." See *Middle Georgia Broadcasting Co.*, 32 FCC 2d 974, 23 RR 2d 510 (1972). Citizens has not shown that it has any knowledge or materials relevant to the issues in question in this proceeding. In fact, Citizens concedes in its appeal that it "has no present intention of calling any of its own witnesses in this case, or even of cross-examining other witnesses." Thus, it appears that Citizens' sole interest in intervening is to protect its financial interest in Hertz and not to advance the resolution of the issues. Therefore, the Board does not believe that the Administrative Law Judge erred in denying Citizens leave to intervene on this ground either.[7]

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[5] See *Office of Communication of United Church of Christ* v. *FCC*, 123 U.S. App. D.C. 328, 359 F. 2d 994, 7 RR 2d 2001 (1966).

[6] Both appellants rely on *Image Radio, Inc.*, FCC 68M–434, 12 RR 2d 671, aff'd. 13 RR 2d 205, 13 FCC 2d 59 (1968), where creditors of the licensee corporation were allowed to intervene, as the controlling precedent on this point. There, however, as the Presiding Judge below observed, the crucial factor was that the corporation had declared bankruptcy and was in the hands of a trustee; thus, the Judge held that the creditors had a direct financial stake in the outcome of the proceeding. Unlike that case, although it is alleged here that default on certain obligations has occurred, it is not alleged that payment has been demanded and rejected and that the corporation has been placed in receivership.

[7] With respect to Citizens' desire to be served with all necessary documents, we point out that at note 3 of the Presiding Judge's Order, released January 22, 1974, he makes provision for such service upon formal request of the parties.

6. Accordingly, IT IS ORDERED, That the supplement to appeal from adverse ruling, filed January 11, 1974, by Citizens & Southern National Bank, IS DISMISSED; and

7. IT IS FURTHER ORDERED, That appeals from Administrative Law Judge's adverse decision, filed January 9, 1974, and January 29, 1974, by Citizens & Southern National Bank and First National Bank of Jackson, respectively, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

STATEMENT OF BOARD MEMBER PINCOCK

I concur in the result since I find no abuse of discretion in the Administrative Law Judge's ruling.

FCC 74R-126

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of J. MILLARD LECROY, JAMES M. DAVIS, WILL V. ROBERSON AND THOMAS J. ROBERSON, D.B.A. JACKSONVILLE BROADCASTING CO., JACKSONVILLE, ALA. For a Construction Permit	Docket No. 18899 File No. BP-17747

APPEARANCES

Benedict P. Cottone, on behalf of Jacksonville Broadcasting Company; and *William D. Silva*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted April 3, 1974; Released April 10, 1974)

BY THE REVIEW BOARD: NELSON AND PINCOCK. BOARD MEMBER BERKEMEYER CONCURRING IN THE RESULT.

1. This proceeding, which has a long and complicated history, originally involved the applications of Jacksonville Broadcasting Company (Jacksonville) and University Broadcasting Company (University) for permits to construct a new standard broadcast station at Jacksonville, Alabama, and the application of Heart of Dixie Broadcasting Company for Sylacauga, Alabama. The Commission by Memorandum Opinion and Order, FCC 70-704, 35 FR 11307, published July 15, 1970, designated the applications for hearing to resolve various disqualifying issues, a 307(b) issue and an areas and populations issue. Subsequently, by Order, FCC 70M-1460, released October 26, 1970, the Presiding Judge dismissed Heart of Dixie's application.

2. On August 28, 1970, University filed a motion to enlarge issues against Jacksonville requesting, *inter alia*, a Rule 1.526(a)(1) (public inspection file) issue. However, before the Review Board could act on the motion, Jacksonville and University filed, on October 15, 1970, a joint petition for approval of an agreement seeking dismissal of the Jacksonville application and reimbursement by University of Jacksonville's expenses in an amount not to exceed $5,000. The Board acted first upon University's motion and added a Rule 1.526(a)(1) issue against Jacksonville by Memorandum Opinion and Order, 26 FCC

2d 929, 20 RR 2d 626, released November 10, 1970.[1] On November 16, 1970, Jacksonville filed a petition for reconsideration of the Board's action. By Memorandum Opinion and Order, 31 FCC 2d 749, released November 19, 1970, the Board held the applicant's joint request in abeyance for ten days in order to permit Jacksonville time either to resolve the Rule 1.526(a)(1) issue or to indicate its willingness to accept dismissal without reimbursement at that time and to go forward with the hearing on the outstanding qualifications issue to determine whether it could ultimately be reimbursed. Further comments were filed by Jacksonville; however, the Board held, in a Memorandum Opinion and Order, 21 RR 2d 931, released May 3, 1971, that Jacksonville had not addressed itself to the Rule 1.526(a)(1) issue. In light of Jacksonville's failure to clarify matters under the Rule 1.526(a)(1) issue or to indicate its willingness to accept dismissal without reimbursement, the Board denied both the petition for reconsideration and the joint request for approval of agreement.

3. Prior to the denial of the above petitions, the Broadcast Bureau, on December 7, 1970, had requested the addition of two character qualifications issues to determine the facts and circumstances surrounding Jacksonville's participation in the joint request for approval of agreement and to determine whether James M. Davis, a Jacksonville partner, had withdrawn from the partnership comprising Jacksonville Broadcasting Company. The Bureau's request was based upon two signed, but unsworn communications sent to the Commission by Will V. and Thomas J. Roberson, partners in Jacksonville, in which they asserted that their consent to enter into a joint request with University for dismissal of Jacksonville's application had not been obtained by J. Millard Lecroy, the partner who signed the agreement on behalf of the partnership, and that they had received correspondence from James M. Davis to the effect that he had withdrawn from the partnership. Consequently, in the same Order in which the Board denied the above joint request, it added the following two character issues against Jacksonville:

(a) To determine all of the facts and circumstances surrounding Jacksonville Broadcasting Company's participation in the joint request for approval of agreement, filed with the Commission on October 15, 1970, by Jacksonville Broadcasting Company and University Broadcasting Company, and in the dismissal agreement, dated October 7, 1970, between the same parties with particular regard to:

(1) whether Will V. Roberson and Thomas J. Roberson, partners in Jacksonville Broadcasting Company, consented to the dismissal agreement or whether they, in fact, misrepresented their lack of participation in the dismissal agreement in a joint statement, filed with the Commission on November 2, 1970; and

(2) whether J. Millard Lecroy, a partner in Jacksonville Broadcasting Company, misrepresented the consent of all the principals of the applicant to the October 7, 1970, dismissal agreement.

(b) To determine whether James M. Davis has withdrawn as a partner from Jacksonville Broadcasting Company and, if so, to determine:

(1) the effect thereof on the partnership's status and the applicant's proposal; and

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[1] The issue reads as follows:

To determine whether J. Millard Lecroy, James M. Davis, Will V. Roberson and Thomas J. Roberson, d/b as Jacksonville Broadcasting Company have maintained a copy of their application for public inspection as required by Section 1.526(a)(1) of the Rules, or, if not, the effect on this applicant's requisite and comparative qualifications to be a Commission licensee.

(2) whether James M. Davis misrepresented his participation in the partnership in affidavits, dated October 3, 1970, and November 11, 1970, filed in support of the joint request for approval of agreement and Jacksonville's petition for reconsideration; and

(3) whether Jacksonville Broadcasting Company has failed in its responsibility to keep its application accurate and complete as required by Section 1.65 of the Commission's Rules.

4. The applicants refiled, with the Presiding Judge, their joint request for approval of agreement on September 23, 1971. The request was expressly made contingent upon the resolution of the character issue against Jacksonville. The record was closed on October 18, 1971. In her Initial Decision,[2] Administrative Law Judge Lenore G. Ehrig concluded that Jacksonville had met the Rule 1.526(a)(1) issue and the issue involving Davis' position as a partner in Jacksonville. She also concluded, however, that Jacksonville had not met the issues as to whether the Robersons consented to the dismissal agreement or whether statements they made on November 2, 1970, misrepresented their lack of participation in the dismissal agreement. Consequently, since all of the character qualifications issues were not resolved in its favor, the Judge held that Jacksonville's request for dismissal with provision for reimbursement could not be granted. Finding University to be qualified in all respects, the Presiding Judge granted University's application and denied the joint request, Jacksonville's request for dismissal and Jacksonville's application.

5. On March 9, 1972, Jacksonville filed the exceptions and the brief in support thereof which are presently before us, excepting, among other things, to the Judge's failure to approve the joint request for approval of dismissal agreement and to allow reimbursement. However, on March 17, 1972, the Broadcast Bureau filed with the Review Board a petition to reopen the record and to enlarge issues. The Bureau alleged that both applicants had engaged in negotiations relating to reimbursement of Jacksonville despite the Administrative Law Judge's refusal to permit reimbursement. In brief, a principal of each applicant submitted an affidavit accusing the other of initiating unauthorized reimbursement; University stated that Jacksonville demanded money not to appeal while Jacksonville alleged that University offered to reimburse Jacksonville for not appealing. The Board, by Memorandum Opinion and Order, 34 FCC 2d 881, 24 RR 2d 292, released May 11, 1972, found that the Bureau had raised sufficient questions to warrant addition of appropriate issues against both applicants to determine whether they had abused the Commission's processes. The record was reopened and a further hearing was held on July 17 and 18, 1972. Subsequently, on November 6, 1972, the Broadcast Bureau filed a request with the Presiding Judge to reopen the record once again for the addition of newly discovered evidence related directly to the candor of James Vice, one of University's principals. By Order, released November 27, 1972, the Bureau's request was granted and further hearings were held on December 19, 1972 and February 13, 1973. In a Supplemental Initial Decision, FCC 73D–25, released May 10, 1973, the Administrative Law Judge concluded that Jacksonville had not abused the Commis-

[2] FCC 72D–8, released February 8, 1972.

sion's processes; however, since University did not attend the hearing and indicated that it no longer intended to prosecute its application, the Presiding Judge at the hearing, and by Memorandum of Ruling, FCC 73M–207, released February 15, 1973, dismissed University's application with prejudice for failure to prosecute. In a statement as to the Supplemental Initial Decision and Initial Decision, filed June 6, 1973, Jacksonville indicated that it would not file exceptions to the Supplemental Initial Decision; however, it stated that it intended to continue to pursue its exceptions to the Initial Decision. Oral argument was heard by a panel of the Review Board on January 17, 1974.

6. During the oral argument, Jacksonville acknowledged that it was "the only party you have here, with the exception of the Broadcast Bureau." (Tr. 685.) Jacksonville's exceptions, in substance, are addressed to the failure of the Administrative Law Judge to approve the joint request for approval of the dismissal agreement. In order for us to consider these exceptions, we must be assured that the substance, the joint request to which the exceptions are addressed, is still pending in and material to this proceeding; in other words, whether or not the dismissal of University's application resulted in the mooting of the joint request. By definition, a joint request, no matter for what purpose, requires at least two parties,[3] and, in our opinion, there is no longer a joint request for us to consider. University's withdrawal from this proceeding leaves Jacksonville as the only remaining applicant. Since only one party remains to the original joint request, the request is unilateral and necessarily becomes moot.[4] Not only does the dismissal of University's application by the Presiding Judge after its notice of withdrawal persuade us that there is no longer a joint request, but, in addition, University, the other party to the joint request, clearly stated to Jacksonville in a letter dated March 16, 1972, that it was withdrawing from "any and all offers of reimbursement to Jacksonville." [5] This repudiation by University of one of the basic terms of the agreement upon which the joint request is based,[6] in our opinion, constitutes an unequivocal withdrawal by University from the joint request. Since Jacksonville's exceptions are addressed, in substance, to alleged errors surrounding, and to the Presiding Judge's failure to approve, the request, we conclude that we have nothing before us to

[3] Black's Law Dictionary defines "joint" as: "united; combined; undivided; done by or against two or more; coupled together in interest or liability." *Black's Law Dictionary*, Rev. 4th Ed. (1968).

[4] In her Supplemental Initial Decision, the Presiding Judge reached a similar conclusion: "It also seems that with the dismissal of the University application and with the uncontested denial of the Jacksonville application, the entire matter of implementation of the dismissal agreement [the joint request] has become moot." Supplemental Initial Decision, paragraph 9. We agree with the Presiding Judge and note that no exception has been filed with respect to said conclusion.

[5] The letter, which is in the record, is signed by James Vice, vice president of University. Vice is the University principal who participated in the negotiations with Jacksonville leading to the joint request and is also the principal who signed the dismissal agreements on University's behalf.

[6] We are aware of the contractual nature of the agreement between Jacksonville and University underlying their joint request and that Jacksonville may pursue a cause of action against University for breach of contract. Perhaps a successful prosecution of such a suit by Jacksonville may turn on an approval of the joint request; however, it is well established that the Commission will not resolve private contractual disputes between parties in proceedings before the Commission. See, The Delsea Broadcasters (WDVL), 25 FCC 449, 16 RR 86 (1958).

resolve. Therefore, all of Jacksonville's exceptions to the Initial Decision will be dismissed as moot.[7]

7. Even if we were in a position to conclude that we still had a viable joint request before us, we would still have to deny it because there is no showing that a grant of the joint request would serve the public interest. The Communications Act of 1934, as amended, makes provision for dismissal agreements in Section 311(c),[8] and that section expressly provides that "the Commission shall approve the agreement *only* if it determines that the agreement is consistent with the public interest, convenience or necessity." (Emphasis added.) Moreover, the Commission has repeatedly stated that it "shall approve [a joint agreement] *only* if it determines it to be consistent with the public interest. . . ." *National Broadcasting Co., Inc.*, FCC 63–257, 25 RR 67, 72 (1963). (Emphasis added.) *Cf. Office of Communication of the United Church of Christ* v. *FCC*, 150 U.S. App. D.C. 339, 465 F.2d 519, 24 RR 2d 2001 (1972); *Radio Station WSNT, Inc.*, — FCC 2d —, 29 RR 2d 625 (1974). The Commission has found the public interest to be served where: an early termination of litigation results; service to a proposed community of license is expedited; [9] by deleting one of the parties to the proceeding, the hearing processes are simplified; and, a time consuming and expensive hearing can be avoided. See, *e.g.*, *Flower City Television Corp.*, 2 FCC 2d 448, 7 RR 2d 528 (1966); and *Capitol Broadcasting Corp.*, 3 FCC 2d 285, 7 RR 2d 226, review denied FCC 66–692, 8 RR 2d 201 (1966).

8. Jacksonville has not shown any of the above or any other public interest benefits which would flow from our approval of the joint request. In fact, in light of the denial of Jacksonville's application and the dismissal of University's application with prejudice, one of the primary objectives for approving dismissal agreements in general and this one in particular, that is, expedition of a new service (in this case, a first local service), will not result from our approval of this agreement.[10] It is clear that only Jacksonville would appear to benefit from approval of the joint request, and that is insufficient to warrant the requested action. *Cf. Cragin Broadcasting Co.*, 7 FCC 2d 511, 9 RR 2d 1127, reconsideration denied 9 FCC 2d 687, 10 RR 2d 1112 (1967). As the Supreme Court stated in the landmark *Pottsville*

[7] Jacksonville is not in any position to claim that it has acquired certain equities because it did not prosecute its application pursuant to its agreement with University. On the contrary, its request for dismissal pursuant to the first joint request was denied by the Board on April 29, 1971. Thereafter, although the parties proceeded to hearing, Jacksonville made its own unilateral determination not to proceed with the production of evidence as to the *Suburban* and financial issues framed against it (Tr. 48). As a result, the Presiding Judge denied its application on the merits and in the same Initial Decision denied its request for dismissal under the joint agreement. In short, at no time was Jacksonville misled into not prosecuting its application. Rather, the entire chain of prior rulings alerted Jacksonville to the possibility of the situation in which it ultimately found itself—no viable application, no existing joint request and no reimbursement.

[8] See also Section 1.525 of the Commission's Rules.

[9] The only public interest statement contained in the joint affidavit accompanying the joint request is that Jacksonville has no local station and approval of the agreement would enable a station "to go on the air more quickly. . . ."

[10] On June 8, 1973, the Review Board received a letter from counsel for Jacksonville who had not previously represented it, informing the Board, *inter alia*, that Jacksonville intended to "reconstitute" itself as a partnership and pursue its application for an AM station in Jacksonville, Alabama. On January 8, 1974, the Board received further correspondence from counsel informing us that Jacksonville no longer intended to pursue its application. This second correspondence further supports our conclusion that no public interest benefits would flow from our approval of the joint request. See Tr. 685 where official notice of the correspondence was acknowledged by Jacksonville.

case [11] "the Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication." The touchstone of the statute is the *public* interest, not the private interests of the parties who come before the Commission. We have carefully reviewed all of the cases cited by Jacksonville and are of the view that they do not warrant any changes in the conclusions which we have reached. Therefore, we must conclude that in addition to being moot, approval of the joint request would not serve the public interest, convenience, or necessity.[12]

9. Accordingly, IT IS ORDERED, That the joint request for approval of agreement, filed September 23, 1971, IS DISMISSED as moot; that the exceptions, filed March 9, 1972, by Jacksonville Broadcasting Company ARE DISMISSED as moot; that the application of Jacksonville Broadcasting Company (File No. BP–17747) for a new standard broadcast station at Jacksonville, Alabama, IS DENIED; and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
JOSEPH N. NELSON,
Member, Review Board.

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[11] *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

[12] In its Brief and at the oral argument, Jacksonville urged that "the Robersons could not possibly benefit in any way from the Board's approval of this agreement." (Tr. 669.) Although this question has been rendered moot, an observation concerning this contention is warranted. Jacksonville Broadcasting Company is a partnership organized by J. Millard Lecroy, James M. Davis, Will V. Roberson and Thomas J. Roberson. The partnership agreement (stipulated into the record) provides, among other things, that the partnership shall continue "until dissolved according to law"; that *all profits and losses* shall be divided among the partners in the following percentages; Lecroy and Davis—40.815% each and the Robersons—9.185% each (Tr. 154, 155); and that in case of dissolution of the partnership, "the assets are to be divided in the ratio of the capital invested at the time of dissolution." Thus, since the joint agreement calls for reimbursement to Jacksonville Broadcasting Company and not, as implied at oral argument, to "the two partners who were active in the partnership", any reimbursement received by Jacksonville would either reduce its losses or would create or increase its profits, a situation which would appear to enure to the financial benefit of the Robersons.

FCC 72D-8

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of J. MILLARD LECROY, JAMES M. DAVIS, WILL V. ROBERSON AND THOMAS J. ROBERSON, D.B.A. JACKSONVILLE BROADCASTING CO., JACKSONVILLE, ALA.	Docket No. 18899 File No. BP-17747
JAMES J. LESSLEY, GEORGE J. LESSLEY AND JAMES C. VICE, D.B.A. UNIVERSITY BROADCASTING CO., JACKSONVILLE, ALA. For Construction Permits	Docket No. 18900 File No. BP-17756

APPEARANCES

Benedict P. Cottone and *Douglas A. Anello*, on behalf of Jacksonville Broadcasting Company, *Stanley H. Sidicane*, on behalf of University Broadcasting Company, *Jay L. Witkin*, *Katherine S. McGovern*, and *Earl C. Walk*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER LENORE G. EHRIG

(Issued February 1, 1972; Released February 8, 1972)

PRELIMINARY STATEMENT

1. The mutually exclusive applications of Jacksonville Broadcasting Company and University Broadcasting Company for a permit to construct a new standard broadcast station at Jacksonville, Alabama, on 1090 kHz with 250 watts and 500 watts, respectively, daytime only, were first designated for hearing by the Commission in its Memorandum Opinion and Order, released July 9, 1970. Also designated at that time was the mutually exclusive application of Heart of Dixie Broadcasting Company seeking the same frequency at Sylacauga, Alabama. By order of the Examiner, released October 26, 1970, the Heart of Dixie application was dismissed, thereby rendering moot all but the following issues:[1]

1. To determine the areas and populations which would receive primary aural service from these proposals and the availability of other primary services to such areas and populations (1.0 mv/m in the case of FM).
2. To determine whether the applicants are financially qualified to construct and operate their proposed stations.
3. To determine the efforts made by . . . University Broadcasting Company to ascertain the community needs and interests of the areas to be served and the means by which [it] propose[s] to meet those needs and interests.

[1] For convenience, these issues are renumbered seriatim. The issues later added by the Review Board are given the next numbers.

4. To determine, in the event it is concluded, pursuant to the foregoing issue, that one of the Jacksonville proposals should be favored, which of the said proposals would better serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if any, of the applications should be granted.

2. On August 28, 1970, University filed a motion to enlarge issues against Jacksonville. On October 15, 1970, before the Board had an opportunity to act on University's enlargement request, Jacksonville and University filed with the Review Board a joint petition for approval of an agreement seeking dismissal of the Jacksonville application and reimbursement by University of Jacksonville's expenses in an amount not to exceed $5,000.

3. Two actions followed. First, by Order released November 10, 1970, the Review Board granted University's enlargement request and added the following issue:

6. To determine whether J. Millard Lecroy, James M. Davis, Will V. Roberson and Thomas J. Roberson, d/b as Jacksonville Broadcasting Company have maintained a copy of their application for public inspection as required by Section 1.526(a)(1) of the Rules, or, if not, the effect on this applicant's requisite and comparative qualifications to be a Commission licensee.

The Board placed the burden of proceeding with the introduction of evidence on University and the burden of proof upon Jacksonville. Jacksonville immediately sought reconsideration. Thereupon, on November 19, 1970, the Board released a Memorandum Opinion and Order, holding in abeyance for 10 days action on the applicants' joint request for approval of agreement in order to permit Jacksonville either to attempt to resolve the Section 1.526(a)(1) issue which had just been added, or to indicate its willingness to accept dismissal without reimbursement at this time and to go forward with the hearing on the outstanding qualifications issue to determine whether it could ultimately be reimbursed. In response, Jacksonville filed further comments wherein it directed the Board's attention to its earlier filed petition for reconsideration.

4. In a Memorandum Opinion and Order released May 3, 1971, the Board observed that Jacksonville's reconsideration petition had not even addressed itself to the Rule 1.526(a)(1) issue. Since, in the Board's view, Jacksonville had made no serious attempt to resolve this issue nor indicated its willingness to accept dismissal without reimbursement at this time, the Board denied both the petition for reconsideration and the joint request for approval of agreement.

5. In its same Order, at the request of the Broadcast Bureau, the Board added the following additional issues against Jacksonville:

7. To determine all of the facts and circumstances surrounding Jacksonville Broadcasting Company's participation in the joint request for approval of agreement, filed with the Commission on October 15, 1970, by Jacksonville Broadcasting Company and University Broadcasting Company, and in the dismissal agreement, dated October 7, 1970, between the same parties with particular regard to:

(1) whether Will V. Roberson and Thomas J. Roberson, partners in Jacksonville Broadcasting Company, consented to the dismissal agreement or whether they, in fact, misrepresented their lack of participation in the dismissal agreement in a joint statement, filed with the Commission on November 2, 1970; and

(2) whether J. Millard Lecroy, a partner in Jacksonville Broadcasting Company, misrepresented the consent of all the principals of the applicant to the October 7, 1970, dismissal agreement;

8. To determine whether James M. Davis has withdrawn as a partner from Jacksonville Broadcasting Company and, if so, to determine:

(1) the effect thereof on the partnership's status and the applicant's proposal;

(2) whether James M. Davis misrepresented his participation in the partnership in affidavits, dated October 3, 1970, and November 11, 1970, filed in support of the joint request for approval of agreement and Jacksonville's petition for reconsideration; and

(3) whether Jacksonville Broadcasting Company has failed in its responsibility to keep its application accurate and complete as required by Section 1.65 of the Commission's Rules.

The Board placed the burden of proceeding and the burden of proof under these issues upon Jacksonville.

6. Finally, on August 27, 1971, the Board added a *Suburban* issue against Jacksonville, as follows:

9. To determine the efforts made by Jacksonville Broadcasting Company to ascertain the community needs and interests of the areas to be served and the means by which it proposes to meet these needs and interests.

7. On September 22, 1971, a hearing was held on University's qualifying issues (i.e. financial and suburban) plus the coverage issue. Additionally, University presented evidence pursuant to its burden of proceeding under the Section 1.526(a) issue. The next day, Jacksonville and University refiled with the Examiner their Joint Request for Approval of Agreement,[2] contingent upon resolution by the Examiner of the character issues added by the Review Board against Jacksonville's principals. Toward this end, further hearing was held on October 18, 1971, with respect to these character issues. The record was closed with no testimony having taken on the comparative issue. Proposed Findings of Fact and Conclusions of Law were filed by all parties.

FINDINGS OF FACT

8. *The Applicants.* The Jacksonville Broadcasting Company is a partnership composed of J. Millard Lecroy and James M. Davis, each holding a 40.815% interest, and Thomas J. and Will V. Roberson, brothers, each holding a 9.185% interest. The University Broadcasting Company partnership is composed of James M. Lessley, George J. Lessley, his father, and James C. Vice, holding 40%, 40% and 20% interests respectively.

JACKSONVILLE BROADCASTING COMPANY

9. Since Jacksonville has not met its burden under all of the designated issues (e.g., the financial and survey issues), its application cannot be granted. It may, however, receive partial reimbursement for its expenses under the terms of the joint agreement of the parties[3] conditioned on its satisfactory resolution of the special issues designated against it.

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[2] In connection with this Initial Decision, the Examiner will dispose of the Joint Request for Approval of Agreement filed by the parties on September 23, 1971; the simultaneously filed Petition of Jacksonville Broadcasting Company to Dismiss Application; and the Broadcast Bureau's Comments on the Joint Request, filed on October 4, 1971.

[3] The attachments to the Joint Request for Approval of Agreement satisfy the requirements of Section 1.525(a) of the Commission's Rules and justify reimbursement in the requested amount.

Issues 7 and 8—The Character Issues

10. Attention is directed at the outset to the facts and circumstances surrounding Jacksonville's participation in the Joint Request for Approval of Agreement, filed on October 15, 1970 (issue 7) as well as to a determination of whether James M. Davis has withdrawn as a partner from this applicant (issue 8). These two issues evolve from allegations made by Will and Thomas Roberson in the following unsworn communication received by the Commission on November 2, 1970, concerning which official notice is taken.[4]

Comes now Will Roberson and Tom Roberson, partners in the Jacksonville Broadcasting Company and would state to the Examiner in connection with the captioned applications as follows:

1. That your file will reflect that the undersigned Will V. Roberson and Thomas J. Roberson entered into an agreement with J. Millard Lecroy and James M. Davis in connection with your file number BP–17747. That on the 21st day of October the undersigned were furnished a copy of the petition dated October 14, 1970 of Jacksonville Broadcasting Company to dismiss application signed by Mr. Douglas A. Anello; that neither of the undersigned has authorized anyone to file any petition to dismiss the application.

2. The undersigned have been involved in this application since its inception. The undersigned have held the property mentioned in the application available to the corporation since the discussions first began in connection with this venture. Several sales have been missed because of the fact that the undersigned were holding the property available to Jacksonville Broadcasting Company in line with the original agreement. The undersigned have been put to great expense and have spent many hours in connection with the application.

3. We understand that certain negotiations and discussions have taken place between the University Broadcasting Company and Mr. Lecroy of the Jacksonville Broadcasting Company and possibly others. We cannot say what negotiations and what transactions have taken place between Mr. Lecroy and the principles in the University Broadcasting Company but we do not feel that we have not [sic] been treated fairly in the matter and we do not feel that it would be to the best interest of the citizens of Jacksonville for the application to be granted based on the file before you at the present time. We are informed that under the Alabama Law each partner is indispensable in making a decision and that a partner with as little as one percent interest has just as much voice in a decision as a partner with a ninety nine percent interest. In view of this we do not feel that any agreement made by Mr. Lecroy or any of the other partners would be effective without our assent. We have in our possession a letter from Mr. Davis, one of the original partners in Jacksonville Broadcasting Company, resigning and withdrawing from the partnership. There has been no agreement bringing him back into the partnership.

11. Official notice is also taken of the following additional communication which the Commission received from the Robersons on June 2, 1971:[5]

That we, the undersigned, withdraw our application for construction permit for the following reasons:

1. Originally our partnership was composed of J. Millard Lecroy, James M. Davis and the undersigned; that heretofore in 1970 Mr. Lecroy without our knowledge entered into negotiations to sell out to University Broadcasting Company and that under the conditions which have developed the undersigned do not feel that the partnership can continue in existence.

2. There have been certain allegations that Mr. James M. Davis never withdrew from the partnership and your file will reflect that the Washington attor-

[4] Copies of this communication were not then served on the Examiner or on any of the parties to this proceeding. On December 7, 1970, this document was made a part of the Broadcast Bureau's Petition to Enlarge Issues which ultimately led to the Review Board's addition of the character issues with which we are here concerned.

[5] This, too, was unserved and unsworn.

ney for Mr. Lecroy and Mr. Davis and for the University Broadcasting Company are still contending that Mr. Davis is a member of the partnership. Attached hereto is a photostat copy of a statement signed by said James M. Davis withdrawing from said partnership which resignation was accepted by the remaining partners on or about September 1, 1970 in a meeting of the partners in the office of Jack Wilson our local attorney in Anniston, Alabama.

12. Neither Will Roberson, Thomas Roberson, nor their former attorney, Jack Wilson, testified in this proceeding.[6] Mr. Lecroy testified that he had placed calls to both Robersons about one week before the hearing on these issues in an attempt to ask the Robersons to come to Washington to testify. Although he was told they would call back the next day, neither did. In addition, counsel for Jacksonville stated that he had contacted Wilson requesting him to have the Robersons present at the hearing. Wilson wrote back, merely stating that Will Roberson had discussed the matter with Lecroy. The Robersons were not subpoenaed by Jacksonville.

13. By way of background, it is pointed out that the Jacksonville application was filed almost five years ago, on May 10, 1967. Under the terms of their partnership agreement, Lecroy was to contribute $19,900 in cash; Davis, $100; and Will and Thomas Roberson, land valued at $4,500. Davis, who has been employed at Station WEIS in Centre, Alabama, since 1961, is the only Jacksonville partner with any broadcast experience. Shortly before the designation of these applications for hearing, the General Manager and part owner of WEIS committed suicide. Davis took over and was offered an ownership interest in the station. The heavy duties of this position made it impossible for him to continue to devote the necessary time to the Jacksonville application. Also, Davis felt that he would be precluded from having interests in both the proposed Jacksonville station and in Station WEIS because of contour overlap. These factors, in Davis' view, required him to make an election. He ultimately decided to drop out of the Jacksonville application and stay with WEIS since he had been with the station for a number of years, was the only one familiar with its operation, and knew the people of Centre and the WEIS customers. He felt that the continued existence of WEIS virtually rested on whether he stayed or left. In addition, it seemed to him that chances were good that he would have no problem in purchasing an interest in WEIS. On the other hand, since the Jacksonville application was involved in a hearing with two other applications, he believed that a long time would elapse before a grant could be made, with no certainty that Jacksonville would prevail.

14. In mid-July 1970, Davis informed his associates of his desire to leave the partnership. Lecroy and the Robersons agreed that they could not, under the circumstances, blame him for wishing to withdraw, and indicated that they would release him from his agreement if he could find an experienced radio man who would be willing to come into the partnership and who would be acceptable to all of them. At this meeting, Lecroy was authorized to retain an attorney in Washington to represent Jacksonville Broadcasting Company in the forthcom-

[6] Official notice is taken of the fact that on May 24, 1971, the Commission received a communication from Mr. Wilson stating that he was withdrawing his appearance on behalf of the Robersons.

ing hearing. In mid-August 1970, the firm of Cottone and Peterson, of which Douglas Anello was a member, was engaged.

15. As a result of their July meeting, Davis contacted Ronald J. Livengood, assistant manager of WAAX, Gadsden, Alabama, sometime later that month. He explained the circumstances of his desire to withdraw from the Jacksonville Broadcasting Company and the need to find someone qualified to take his place. On the following day, Davis offered Livengood, at no charge, his interest in the partnership, subject to the approval of the other partners. Thereafter, Cottone was informed that Davis had someone who appeared to be an acceptable substitute. Cottone advised that Davis' withdrawal should be handled by a single amendment to the application covering both Davis' withdrawal and the substitution of Livengood. In late August, Cottone was told by both Davis and Wilson that it had been agreed that if a substitution could not be accomplished, the Jacksonville application would be withdrawn in return for partial reimbursement of expenses.

16. On August 27, 1970, in anticipation of a meeting the following day between Lecroy, the Robersons and Livengood, at which a revision of the partnership agreement to substitute Livengood was expected to be finalized, Davis wrote to Cottone as follows:

> I am enclosing a copy of my letter of withdrawal from the Jacksonville Broadcasting Company. Mr. Anello advised me to send a copy to you so you could proceed with getting my name removed from the application.
>
> The Jacksonville Broadcasting Company is preparing an amendment to replace me with Ronald Livengood and their attorney, Jack Wilson, will get it to you pronto.

Davis enclosed a second letter of the same date, as follows:

> This letter is to officially notify you of my withdrawal as a partner in the Jacksonville Broadcasting Company as of this date.
>
> Due to the increased pressure of my position as a manager of WEIS Radio, caused by the recent death of Mac M. Thomas, co-owner and General Manager, my continuation as a partner in the Jacksonville Broadcasting Company, Jacksonville, Alabama, is impossible.

17. According to Cottone, this second letter with respect to Davis' withdrawal was written pursuant to instructions from his office that it be prepared for submission as part of the amendment to the application which would substitute Livengood. Cottone stated that Davis' dating of this letter was contrary to the instructions which he had been given that the date should be the actual date of Livengood's substitution. Moreover, Cottone testified at the hearing that as events developed, no amendment was ever filed or necessary since Davis' withdrawal never became effective. Nevertheless, copies of the erroneously dated resignation letter were sent to the partners. Davis also called Lecroy to tell him that this letter was forthcoming, explaining that he was sending the letter because he anticipated that the Livengood matter would be resolved at the next meeting.

18. On August 27 or 28, 1970, Livengood met with the remaining partners at a Jacksonville restaurant. It was agreed at this meeting that Livengood would be approved to replace Davis. No partnership agreements were drawn up, however, and Livengood signed nothing at that time. A further meeting was held in the office of attorney Jack Wilson in Anniston, Alabama. Those present other than Wilson in-

cluded Millard Lecroy, his son Danny, Will Roberson, and Livengood. This meeting was set up by Will Roberson apparently for the purpose of drawing up the partnership agreement and beginning the process of filing with the Commission the amendment to substitute Livengood for Davis. During the course of the meeting, according to Livengood, Will Roberson expressed his feeling that the value of his land had increased from $4,500 to $10,000 since the application had been on file with the Commission. This being so, Will felt that he and his brother were entitled to a greater interest in the partnership. Livengood stated that at this point Wilson urged those involved to consider carefully whether to continue with the application. He told them that if all parties were not willing to continue, "Now would be the time to make that decision."

19. After the meeting, Livengood discussed with Lecroy the question of the Robersons' having a larger percentage in the company. They both felt that the cost of constructing the station had certainly increased in proportion to the increased land value, and neither of them was willing to concede a larger percentage of ownership to the Robersons. Livengood then decided that he had no desire to become involved in a partnership where "turmoil" was apparently about to erupt. He determined not to be Davis' replacement and suggested to Lecroy that he consider whether he wanted to continue or to withdraw in view of the latest developments. Thus, Livengood never actually entered the partnership, although he had seriously considered doing so before it appeared to him that the partnership was not on solid ground. A week later, Livengood received a call from Will Roberson, asking Livengood if he would be interested in pursuing the application if the Robersons took over. Livengood said he would not be interested in joining without Lecroy.

20. On August 31, Lecroy, Davis and Lecroy's son met in Livengood's office and called Cottone to explain the situation. Davis advised Cottone of the decision which had been reached, either to accept reimbursement of their expenses or to pursue a possible merger of Lecroy and the Robersons with the University applicant. Davis did not tell Cottone whether he was speaking on behalf of the entire partnership. Lecroy testified, however, that in a private conversation between them, he had told Davis that he still considered him to be a partner in Jacksonville. Also, at about this time, Davis was advised by Anello that since Livengood would not enter the partnership as his replacement, and since his resignation had not been accepted, Davis was still a member of the partnership. Anello also told Davis that he might be exposed to a suit by the other partners if he withdrew without being replaced by an acceptable substitute with broadcast experience since such loss would jeopardize the chances of Jacksonville in the comparative hearing.

21. In the meantime, on August 27, 1970, counsel for University had already transmitted to Cottone's office an offer to reimburse Jacksonville for expenses in a maximum amount of $5,000. Following discussions with counsel for University as to a possible merger, Cottone's office received an alternative proposal dated September 1, 1970 offering the Jacksonville partners a 25% interest in University without reimbursement of any expenses. In separate conversations held on

approximately September 2 and 3, Cottone was informed by Wilson and Lecroy that while Lecroy was disposed to accept the merger, the Robersons preferred a withdrawal with reimbursement, and that all the partners had agreed to follow the latter course. On September 15, Cottone's office informed University's counsel by letter that Jacksonville accepted the offer with respect to the withdrawal upon reimbursement of expenses.

22. On September 17, 1970, Wilson was sent a list of expenses that Cottone's office had received from Davis and was requested to advise Cottone of any other expenses which had been incurred so that the necessary affidavits could be prepared for submission to the Commission. By letter of September 22, 1970, Wilson forwarded to Cottone the Robersons' expenses, as follows:

12 trips to Anniston, 264 miles at $0.10 per mile	$26.40
Attorneys fee to Wilson, Propst & Steward (This is in addition to $500 owed by partnership which has not been paid)	300.00
Land held for Jacksonville Broadcasting Co. for approximately 6 years (missed several sales)	2,000.00
Miscellaneous expenses, including car used in and about Jacksonville, long distance calls, Xerox work, etc	175.00
Total Expenses	2,451.00
(Should be	2,501.40)

23. On September 25, 1970, Cottone's office wrote Wilson as follows:

> In view of the additional expenses of Will and Tom Roberson, your affidavit should be revised accordingly to substantiate the additional $300 shown. The affidavits of the Robersons, which we assume you will prepare, should not only substantiate their out-of-pocket expense items for travel, long distance and Xerox work, but should include a detailed justification with regard to the $2,000 for the land. The justification must show that this is an actual loss, indicating for example, that the Robersons have had offers for the land of $2,000 in excess of what the land can presently be sold for, and that these offers had to be turned down because of the obligation to hold the land for the partnership. It may be necessary to obtain an affidavit of an appraiser or real estate broker to substantiate this.

24. On September 24, 1970, Anello had sent the following letter to Wilson.

> In connection with the proposed withdrawal of Jacksonville Broadcasting from the comparative hearing presently scheduled before the Federal Communications Commission in return for reimbursement by University of out-of-pocket expenses, it will be necessary for all the parties to sign the enclosed agreement and affidavit, and for Virgil Cicero [an engineer] and Jim Davis to execute personal affidavits. Please do not date the agreement. We will fill it in here.

25. Thereafter, Cottone again spoke to Wilson by telephone urging him to secure an affidavit from the Robersons and to prepare an affidavit of his own costs in connection with representing the Jacksonville application as opposed to representing the Robersons personally. Cottone testified that the only response which he received to his request was an affidavit dated October 5, 1970, which Wilson sent directly to Vice, one of University's partners, in which Wilson's expenses and attorney fees of $500 were set forth for inclusion in the joint request. Upon receipt of this affidavit, Cottone assumed that the Robersons had no intention of claiming $2,000 for their land.

26. Pursuant to agreement of Washington counsel, the joint request and attached joint affidavit were prepared by counsel for University.

It was also agreed that only one partner need sign the joint affidavit for each applicant. As a result, the document was signed and notarized on October 7, 1970, by "J. Millard Lecroy, General Partner" on behalf of Jacksonville and by "James C. Vice, General Partner" on behalf of University.

27. Although only Lecroy signed the affidavit, he testified that he was acting on behalf of the entire partnership. Davis was present with Vice when Lecroy signed. Moreover, Lecroy stated that he had called Will Roberson prior to signing the affidavit, and that Roberson had voiced no objection. Lecroy also stated that Will had called back to say that he had contacted his brother Thomas, and that Thomas had no objection either. Will Roberson told Lecroy that he had seen a copy of the joint affidavit, although Lecroy did not know if Roberson had his own copy.

28. On October 15, 1970, the joint request for approval of agreement was filed with the Commission. Previously, counsel for University had sent Cottone a copy of the joint affidavit which was attached to the joint petition. After receiving it, Cottone "suspects" that his office sent two copies to Davis, whom he was sure would pass on one copy to Lecroy. However, his records do not show where the joint affidavit was sent. In any event, Cottone stated that copies of all matters were sent to Wilson on behalf of the Robersons, never to the Robersons directly. Cottone also testified that a copy of the joint petition would not have been sent to Wilson or Davis until after it had been filed, although he believed that the affidavits would have been sent out earlier because they required signatures.

Issue 6—The Section 1.526(a)(1) (Public Inspection) Issue

29. The only other Jacksonville issue which must be resolved before consideration may be given to the Joint Request of the parties for Approval of Agreement seeks a determination as to whether Jacksonville maintained a copy of its application for public inspection as required by the Commission's Rules. In the sworn affidavit which had triggered the addition of this issue, University's James Vice had alleged that on August 20 and 21, 1970, he had made six unsuccessful attempts during normal business hours to inspect the Jacksonville application at 1001 Roberson Street, a dwelling-type trailer in which Will Roberson lives.

30. Digressing for a moment, as indicated above, the death of the part owner and general manager of Station WEIS had resulted in Davis' appointment as general manager of that station with the promise of an ownership interest. Official notice is taken of the fact that on January 12, 1971, there was filed with the Commission an application (BAL–7220) for approval of the assignment of license of Station WEIS to Cherokee County Broadcasting Company, Inc., a corporation, 100% of whose stock is held by Davis and his wife. According to Jacksonville, processing of this application had virtually been completed when the Review Board's May 1971 order was released adding the character and Section 1.526(a)(1) issues against Jacksonville. It was the opinion of Jacksonville's Washington counsel that it was essential for these issues to be resolved at the earliest possible date in order, *inter alia*, to remove any cloud from Davis which might

jeopardize his acquisition of Station WEIS. Toward this end, Jacksonville filed with the Review Board a Petition to Delete Issues. Attached in affidavit form was the type of evidence which would ordinarily have been offered in hearing. In particular, Jacksonville submitted two affidavits from Davis which responded to Vice's affidavit.

31. In pertinent part, the first affidavit read:

> In regard to the application of the Jacksonville Broadcasting Company being available for inspection; the application, with related matter, was at the office of Mr. Will V. Roberson's Construction Company located in the home of Mr. Roberson, 1000 Roberson Street, Jacksonville, Alabama during regular business hours. During this time Mr. Roberson sold his home and moved just across the street to 1001 Roberson Street, Jacksonville, Alabama. It was just an oversight in not making a change in address. Mr. James Vice, a party in the University Broadcasting Company's application, had no trouble finding Mr. Roberson's office. He told me he went by and Mr. Roberson showed him the Jacksonville Broadcasting Company's application.

Davis' second affidavit attached to the same Petition to Delete stated:

> In an affidavit sworn to November 11, 1970, which was attached to a Petition for Reconsideration dated November 16, 1970, I erroneously stated that the Jacksonville application was available for public inspection at 1001 Roberson Street at all times since the filing date. At that time, I overlooked the fact that Mr. Will Roberson, who had lived and maintained his office at 1000 Roberson Street at the time the application was filed in 1967, had moved across the street to 1001 Roberson Street sometime in 1968. Until he moved, the application was open for public inspection during regular business hours at his former address, 1000 Roberson Street. After he moved his home and office to 1001 Roberson Street, the application was open for public inspection during regular business hours at this changed address. In fact, the Public Notice of the Order of Designation for Hearing published in the Jacksonville News stated explicitly that the application was available for public inspection at 1001 Roberson Street.
>
> At the time of the change of address, we did not have Washington counsel, and it just did not occur to us that something had to be done about the change of address.
>
> In further regard to Mr. James Vice's visit to Mr. Will V. Roberson's home and office, 1001 Roberson Street, Jacksonville, Alabama on several occasions one day wanting to inspect the Jacksonville Broadcasting Company's application, Mr. Roberson related this incident to me when it happened. He said he had been in Sylacauga, Alabama all day due to the serious illness of his mother. He returned home late in the afternoon and was leaving again when Mr. Vice stopped him and wanted to see the application. Mr. Roberson said he showed it to him. In January of this year, Mr. Vice related practically the same story to Mr. J. Millard Lecroy and me when he came to Centre to discuss with us further the matter of a possible dismissal of our application.

32. In its September 20, 1971 Memorandum Opinion and Order denying Jacksonville's Petition to Delete Issues, the Review Board noted with respect to the Section 1.526(a)(1) question, that the factual allegations contained in University's Motion to Enlarge which had prompted the addition of this issue against Jacksonville conflicted in substantial respects with the statements contained in Davis' above-quoted affidavits. Accordingly, it ordered that these discrepancies be explored at hearing even though such course would delay processing of the WEIS assignment application.

33. At the hearing, University submitted Vice's affidavit as its direct case, and offered Vice for cross-examination. Vice testified that on Thursday, August 20, and Friday, August 21, he visited the offices of Will Roberson at 1001 Roberson Street, an address which he had obtained from Jacksonville's public notice. He had not called in advance.

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The office in question was located in a house trailer of the type used in the construction business. Vice knocked on the door each time, but received no answer. There was also no sign of a car. Vice then made inquiry of the neighbors to make sure that he had the correct address. The neighbors informed him that Roberson was about a mile away working on a bridge. According to Davis, Roberson was actually away visiting his sick mother in Sylacauga. In any event, Vice left no message on the office door or anywhere else stating that he had come to see the application.

34. On Monday or Tuesday of the following week, Vice returned to Roberson's office once more seeking to view the Jacksonville application. Finding no one present, he drove away. After he had proceeded about five blocks, someone pulled up behind him and blew the car horn. The driver of the car was Will Roberson. Vice reasoned that Roberson was able to view his car from the top of a hill where he was working.[7]

35. Vice asked Roberson if he could see the application. Roberson took him back to the house. When Roberson asked Vice who he was, and Vice identified himself, Roberson threw the application on the hood of Vice's car. However, he permitted Vice to look at the application for as long as he wished. After that inspection, Vice did not return to see the application again.

UNIVERSITY BROADCASTING COMPANY

Issue 1—The Coverage Issue

36. Jacksonville, Alabama, has a population of 7,715 according to the 1970 U.S. Census. It has no AM or FM radio station.

37. The proposed University facility will serve 90,431 persons within its .5 mv/m contour, 60,017 within its 2 mv/m contour, 31,619 persons within its 5 mv/m contour, 8,262 persons within its 25 mv/m contour, and less than 100 within its 1 volt per meter contour. The areas served are .07 square miles in the 1 volt per meter contour, 18.6 miles in the 25 mv/m contour, 140 miles in the 5 mv/m contour, 386.5 miles in the 2 mv/m contour, and 1,498.0 square miles in the 0.5 mv/m contour.

38. There are two AM stations providing 100% of the proposal's area and population with a 2 mv/m contour, and four more serving it 100% based on the standard 0.5 mv/m contour coverage criteria in rural areas and 2 mv/m coverage in urban areas with over 2,500 population. One FM service provides 100% coverage of the service area of the proposed station. There are also numerous other AM services providing service to a portion of the proposed service area.

Issue 2—The Financial Issue

39. Under its amended showing University's anticipated first year costs of construction and operation are as follows:

[7] The record is confused as to "who chased whom". Davis recalled talking to Will Roberson a few days after Vice saw the application in August 1970. During this conversation, Davis stated that Roberson recounted that Vice had chased him. In addition, both Vice and Davis recalled discussing this incident, although Vice could not remember the details of this discussion. Davis, however, recalled that Vice had told him in January 1971 that he (Vice) had actually chased Roberson in order to see the application. It is noted that at the time Davis testified, he had already read Vice's testimony on this issue. It is also noted that University never offered any rebuttal on this point.

Down payment, equipment	$3,532.98
Payments on equipment (14 months) [1]	3,297.42
Interest on equipment (1 year)	1,059.83
Bank loan principal ($750 × 9 months)	6,750.00
Interest on loan (8 percent)	3,600.00
Operating expenses	26,720.00
Reimbursement to Jacksonville	5,000.00
Total	49,960.23

[1] It is assumed that the applicant will begin payments upon delivery since the equipment letter does not state otherwise.

40. To meet these needs, the applicant relies upon the following sources:

Bank loan	$45,000
Loan by James Vice	4,125
Loan by James J. Lessley	2,909
Loan by George J. Lessley	958
Total	52,992

41. According to a letter dated August 4, 1970, from David W. Pearson, President of the Jacksonville State Bank, that institution is willing to lend the applicant $45,000. As collateral for the loan, James J. Lessley and George J. Lessley will be required to execute a mortgage on their business, Lessco, Inc. and each party (including James Vice) will be required to sign the note individually. Interest is to be at the rate of 8% for a term of 5 years, with payments to begin 3 months after the mortgage is executed.

42. The applicant's three principals have agreed to lend the funds necessary for construction and operation of the station, as well as for the payment necessary for the dismissal agreement. They have also agreed to sign any notes or papers necessary in order to obtain the loan. Finally James and George Lessley have both agreed to execute a mortgage on their business.

43. The balance sheet of James Vice, dated September 20, 1971, reveals the following:

Assets:	
Cash on hand and in banks	$575
Notes and accounts due	1,200
Cash value of life insurance	550
Real estate	23,500
Trucks and autos	3,400
Personal property	9,000
Cash in bank for benefit of University B/C Corp	1,200
Liabilities:	
Current due within 1 year	800
Notes payable to others due in 1 year	------
Long term notes payable	1,900
Real estate mortgage	18,000
Totals of above:	
Assets	39,425
Liabilities	[1] 20,700
Net worth	[1] 18,725

[1] University Exhibit 4 from which these figures were taken contained obvious mathematical errors which have here been corrected.

44. The balance sheet of George Lessley as of September 20, 1971 reveals the following:

Assets:	
Cash on hand and in banks	$976.70
Accounts and notes receivable due from relatives and friends	50,000.00
Real estate owned	24,500.00
Household	7,500.00
Cash value, life insurance	2,000.00
Total assets	84,976.70
Liabilities:	
Notes payable to others	15,479.72
Real estate mortgages payable	11,213.99
Total	26,693.71
Net worth	58,282.99
Total liabilities and net worth	84,976.70

45. Finally, the balance sheet of James Lessley as of September 20, 1971 indicates the following:

Assets:	
Cash	$ 2,544
Accounts and loans receivable	9,755
Notes receivable, not discounted	17,000
Other stocks and bonds	[1] 55,490
Real estate	42,500
Automobiles registered in own name (1)	500
Furnishings and miscellaneous	6,900
½ interest—Wink 1 Hour Cleaners	16,290
Total assets	[2] 150,979
Liabilities:	
Notes payable to banks, unsecured direct borrowings only	3,817
Notes payable to others, unsecured (Lessco, Inc.)	28,000
Notes payable to others, secured	35,000
Mortgages payable on real estate	27,599
Total liabilities	94,416
Net worth	[2] 56,563

[1] Of James Lessley's stocks, only General Mills is listed on an exchange. He values his 10 shares at $360.

[2] University Exhibit 4 from which these figures were taken contained obvious mathematical errors which have here been corrected.

46. With respect to the $3,817 in unsecured notes payable to James Lessley, that entire amount is due and payable within the next year. However, none of the principal on the $28,000 due to Lessco, Inc. is due within one year. Instead, this loan will begin to be paid within the next three years on an installment basis. Moreover, the 6% interest on this loan is to be cumulative, and Lessley will not have to pay out this amount in the next year. The entry "notes payable to others, secured" in the amount of $35,000 involves the remaining balance on the purchase of two dry-cleaning plants from Dr. George Gibbons (out of an original $60,000). Within the next year, this loan is to be

repaid at a base amount of $469.65 per month. In addition, his mortgages payable on real estate are due and payable at the rate of $202.50 per month over the next year.

Issue 3—The Survey Issue

47. Several surveys were made on behalf of University Broadcasting Company. On or about March 19, 1970, University conducted a two week survey of the area including contacts with persons from all ethnic and economic groups. Approximately 70 to 100 contacts were made. A separate man-on-the-street survey was made in addition to the survey of community and business leaders. The parties to the applicant personally met the persons to be interviewed and made notes on such contacts using a pre-prepared form. Both James Vice and James Lessley, 20% and 40% partners in the applicant, participated in the taking of this survey. Persons were contacted in the various small towns within the service area. The forms were evaluated personally by James Vice who proposed programs to meet the needs of the community and help remedy the problems found to exist.

Issue 4—The Comparative Issue

48. In view of Jacksonville's decision to withdraw from this proceeding, no evidence was submitted and no findings are made on the comparative issue.

CONCLUSIONS

49. As indicated above, the parties have twice sought approval of an agreement providing for dismissal of the Jacksonville application in consideration of the payment by University of a portion of Jacksonville's expenses. The first request was denied by the Review Board in May 1971. It was then resubmitted to the Examiner in September 1971. All parties, including the Broadcast Bureau agree that the Joint Request for Approval of Agreement and the supporting affidavits justify the contemplated $5,000 reimbursement and satisfy the requirements of Section 1.525(a) of the Commission's Rules *provided* that Jacksonville favorably resolves the 1.526(a)(1) issue, and the so-called character issues against it. The latter seek a determination as to whether James M. Davis ever actually withdrew from the Jacksonville partnership, whether the Robersons misrepresented their lack of participation in the joint petition looking toward the dismissal of the Jacksonville application, and whether Lecroy misrepresented the consent of all of the Jacksonville partners to the dismissal agreement.

50. *The 1.526(a)(1) Issue.* Insofar as the resolution of the Section 1.526(a)(1) issue is concerned, it is noted that the Review Board emphasized, in its September 20, 1971 order denying Jacksonville's request for deletion of this issue, that the factual allegations contained in University's Motion to Enlarge which prompted specification

of this issue conflicted in substantial respects with the statements contained in the two Davis affidavits which were part of the request for deletion. At the heart of this issue is an affidavit of James Vice, one of University's partners, alleging that he had made six attempts on August 20 and 21, 1970, to see the Jacksonville application at 1001 Roberson Street, but that no one was present. On the other hand, the two affidavits later filed by James Davis stated that Vice had no trouble finding Roberson's office, and that Vice had told Davis that Roberson had shown him the application when Vice had gone to the office. Both Davis and Vice appeared at the hearing. Their testimony resolved the conflict apparent on the face of their respective affidavits. Vice testified that while it was true that he did not see the Jacksonville application on August 20 or 21, 1971, he did see it during the following week for as long as he wished. Moreover, both Vice and Davis agreed that at a later time Vice had discussed with Davis his initial frustrations. Accordingly, this issue is resolved in favor of Jacksonville insofar as any adverse character implications are concerned.[12]

51. In resolving the questions of whether James M. Davis had ever actually withdrawn from the partnership and the matter of the partnership's participation in the joint request for approval of agreement, it is again important to look at the Review Board's Order denying the request for deletion. Here, after considering the very affidavits which were subsequently placed in evidence at the hearing, the Board emphasized its continued concern and stated:

> Significantly, Jacksonville has submitted no statement from the Robersons to support its contentions that: (1) Davis never effectively withdrew from the partnership; and (2) all partners agreed to the reimbursed dismissal of the partnership's application. This failure assumes added importance when viewed in light of the Robersons' communications to the Commission. While it is true that these communications are unverified, the apparent contradictions among the Jacksonville partners that flow therefrom reinforce our earlier determination to inject requisite character qualifications issues against the partnership applicant.

52. *The Matter of Davis' Withdrawal from the Partnership.* Notwithstanding the Board's expressed serious concern, Jacksonville failed to produce the Robersons at the hearing to explain the statements which they had filed with the Commission claiming that Davis had withdrawn from the partnership. The testimony which was adduced at the hearing reveals, however, that the so-called Davis "resignation letter" dated August 27, 1971, was written by Davis at a time when he had reason to believe that Ronald Livengood would become his substitute as a partner in Jacksonville. The Examiner accepts the explanation that Davis did not follow the explicit direc-

[12] It should also be noted in this context that Vice's affidavit is dated August 21, 1970, and that the petition to enlarge issues was filed prior to Vice's meeting with Davis discussed in the Davis affidavits. Accordingly, the record will not support a conclusion that Vice and University intentionally concealed from the Commission the information concerning Vice's eventual viewing of the application.

tions of his counsel when he dated and distributed this letter to the other partners. It is clear that once Livengood refused to join the partnership, Davis was almost immediately informed by his partner Lecroy and by his counsel, Douglas Anello, that they considered him still to be a partner in the applicant. Indeed, Anello advised Davis in no uncertain terms that this was the case. Accordingly, it is found that Davis honestly believed he was still a partner at the time of the various filings. Framed in the wording of the issue added by the Review Board, it is concluded that Davis did not misrepresent his participation in the partnership in the affidavits filed in support of either the Joint Request or the Petition for Reconsideration.

53. *The Matter of the Partnership's Participation in the Joint Request.* With respect to the question of whether the Robersons misrepresented their lack of participation in the Joint Petition or whether Lecroy misrepresented the consent of all the Jacksonville partners, it is again noted that the Robersons were conspicuous by their absence from the hearing. Based upon the testimony of Lecroy and Cottone, it is concluded that Lecroy, acting in part on the advice of his counsel and in part in reliance on a conversation with Will Roberson, believed that it was legal and proper for him to sign the agreement. Accordingly, it is concluded that Lecroy had no intention of misrepresenting the consent of all the partners to the dismissal agreement.

54. Now comes the stumbling block. Without the testimony of the Robersons, it is impossible to reach a conclusion as to whether the Robersons consented to the dismissal agreement or whether, otherwise stated, their November 2, 1970 statement misrepresented their lack of participation in the dismissal agreement. The Bureau takes the position that since Jacksonville did not produce the Robersons by subpoena or otherwise, the partnership cannot be deemed to have met all of the character issues. And, this being so, the request for reimbursement must be denied.

55. Jacksonville takes a contrary position. It maintains that the Bureau cannot justly predicate adverse conclusions against the partnership upon the fact that the "partnership" did not subpoena the Robersons. It points out that 81% of the ownership of the partnership did willingly come to the hearing to be cross-examined, and that the evidence shows that efforts were made to persuade the Robersons to testify but that these efforts were non-productive. According to Jacksonville, if there is an unresolved question as to whether non-record statements made by the Robersons to the Commission in their individual capacities were either misrepresentations, mistaken legal opinions, or possibly the result of a lack of understanding between them and their attorney, such question is immaterial to the consideration of this reimbursement agreement since its approval will in

no way inure to the Robersons' benefit. Jacksonville points out that Lecroy's testimony is uncontradicted that he was furnishing all of the money, and that none of the expenses for which reimbursement will be made by University were incurred by the Robersons. Nor, Jacksonville urges, can the Robersons legally or practically benefit from the reimbursement by University by reason of the possible reduction of any liability they might overwise have for any of the expenses covered by the reimbursement agreement. Whether or not the reimbursement agreement is approved, Jacksonville argues, the Robersons have no liability for any pre-operational expenses. The partnership agreement limits their contribution to land valued at $4,500 which was to be contributed only if a grant was received. Pre-operational contributions and liabilities are solely Lecroy's except for $100 to be paid by Davis. The only "losses" or liabilities to be shared by the Robersons are operational losses. In short, Jacksonville argues, whether or not the reimbursement agreement is approved, there is no legal recourse against the Robersons for any part of the legal fees of which the Bureau fears the Robersons might be relieved. Finally, according to Jacksonville, the Examiner need not here decide whether the evidence adduced under the character issues, sans the testimony of the Robersons, would support a grant of the Jacksonville application. The question to be decided, in Jacksonville's view, is merely whether such evidence will support approval of the reimbursement agreement where no benefit will inure to the 19% of the partnership whose character qualifications have not been affirmatively proven, citing *Western Broadcasting Company*, FCC 71M–1029, released June 21, 1971.

56. Although the Examiner is sympathetic to Jacksonville's dilemma, she agrees with the Broadcast Bureau that since the Robersons failed to come forward to explain the statements which they had submitted to the Commission, which statements were the basis for the Review Board's enlargement of issues, no resolution of these issues can be made. It is simply impossible to get around the above-quoted language in the Board's September 20 Order (see paragraph 51, *supra*), that resolution of the character issues in this proceeding *requires* a full explanation by the Robersons in hearing. It is equally impossible to slough over the fact that the Review Board specifically affixed the burden of proceeding and the burden of proof under these character issues upon Jacksonville. It is axiomatic that the issues designated by the Commission and the Review Board constitute the metes and bounds of the hearing which the Examiner is directed to conduct. The Presiding Officer may neither add issues nor ignore those which have been designated. The latter course, in essence recommended by Jacksonville, would constitute particular folly here where the applicant actually went to the Review Board, sought deletion of the very issues with which we are concerned, and was turned down.

57. Thus, since Jacksonville has failed to provide the necessary testimony from the Robersons, the partnership cannot be deemed to have met the added character issues. This being so, the request for reimbursement must be denied. See *Berwick Broadcasting Corporation*, 15 FCC 2d 624 (1968). In the Examiner's view, the *Western* case upon which Jacksonville relies, is inapposite. There, a character issue was included stemming from the activities of one of the stockholders. When this stockholder withdrew from the applicant corporation, the character issue became moot and a reimbursement agreement was approved. Here, the character issues are by no means moot; a request to delete issues having to do with the Robersons was specifically denied by the Review Board. Thus, contrary to the situation in *Western*, both the issues and the Robersons remain, requiring disapproval of the reimbursement agreement.

58. The Examiner desires to make crystal clear, however, that, based upon the testimony which was adduced at this hearing, she has here concluded (see paragraph 52, *supra*) that at the time of the filing of the Joint Petition and the supporting affidavits, Davis honestly believed that he was still a partner. Therefore, his submission of these affidavits to the Commission did not constitute misrepresentations. This being so, it is assumed that processing of the WEIS assignment application (BAL–7220) may now be completed.

59. Turning now to the surviving applicant, it is concluded that University Broadcasting Company has demonstrated that it has interviewed a representative cross-section of the leaders and members of the community to be served; that as a result of these interviews, the applicant has ascertained a representative list of the current needs and problems of the community; that the applicant proposes to provide program services designed to assist the community in dealing with its needs and problems; and, accordingly, that the applicant has complied with the applicable policies and requirements of this Commission. *Primer on Ascertainment of Community Problems*, 27 FCC 2d 650 (1971).

60. In regard to University's finances, the record shows that University requires $49,960.23 to construct and operate for one year. This figure includes the $5,000 committed to reimburse the Jacksonville Broadcasting Company. To meet these needs, Jacksonville relies on a $45,000 loan from the Jacksonville State Bank and the following individual loans from its principals: James Vice, $4,125; James Lessley, $2,909, and George Lessley, $958.

61. The letter from the Jacksonville State Bank sets forth the principal, interest, terms of repayment, and security. In addition, it has been shown that the principals of the applicant intend to comply with the security provisions. Accordingly, it is concluded that the applicant may be credited with $45,000 from this source.

62. The balance sheet of James Vice, however, shows only the following current liquid assets to meet his $4,125 commitment: cash, $575;

cash value of life insurance, $550; and cash in bank for benefit of University, $1,200, for a total of $2,325.00. Against this amount, Vice shows $800 in current liabilities. Accordingly, Vice may only be given credit for $1,525.00 in current liquid assets in excess of current liabilities.

63. The balance sheet of George Lessley reveals current liquid assets of $976.70 in cash and $2,000 in cash value of life insurance. His balance sheet also shows $26,693.71 in payables, with no determination of how much is current. On the other hand, the accounts and notes receivable in the amount of $50,000 may be deemed to offset these payables. Accordingly, it is concluded that George Lessley may be credited with sufficient liquid assets to meet his commitment of $958.

64. Finally, the balance sheet of James Lessley shows current liquid assets of $2,544 in cash and $360 in listed stocks, for a total of $2,904. Lessley's obligation to the application is $2,909. Against his assets, Lessley has current liabilities consisting of a secured note payable at $469.65 per month, or $5,635.80 for one year, and a current mortgages liability payable at $202.50 per month, or $2,430.00 for one year. Accordingly, since his current liabilities of $8,065.80 exceed his current liquid assets, it is concluded that James Lessley has failed to establish that he has the financial capability to meet his obligation to this applicant.

65. From the above, it is apparent that University may only be given credit for the following sources:

Bank Loan	$45,000
James Vice	1,525
George Lessley	958
Total	47,483

The applicant is thus $2,477.23 short of its required $49,960.23. With the disapproval of the Jacksonville reimbursement agreement, however, University's deficit disappears. Its total anticipated first year's expenses are reduced by $5,000 to $44,960.23. The bank loan alone is sufficient to cover this amount. Accordingly, University is found to be financially qualified to construct and operate its proposed station.

66. In light of the foregoing, it is concluded that University Broadcasting Company is qualified in all respects and that a grant of its application will serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED that the Joint Request for Approval of Agreement filed by the parties on September 23, 1971, IS DENIED. The Petition of Jacksonville Broadcasting to Dismiss Application, also filed on September 23, 1971, and contingent on approval of the agreement attached to the Joint Request IS LIKEWISE DENIED.

IT IS FURTHER ORDERED that unless an appeal is taken to the Commission by a party or the Commission reviews this initial Decision on its own motion in accordance with Section 1.276 of its

Rules, the application of James J. Lessley, George J. Lessley and James C. Vice, d/b as University Broadcasting Company, for authority to construct a new standard broadcast station to operate on the frequency 1090 kHz with 500 watts power, daytime only, at Jacksonville, Alabama, IS GRANTED, and the application of J. Millard Lecroy, James M. Davis, Will V. Roberson & Thomas J. Roberson, d/b as Jacksonville Broadcasting Company for a permit to construct a new standard broadcast station to operate on the frequency 1090 kHz with 250 watts power, daytime only, at Jacksonville, Alabama IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
LENORE G. EHRIG, *Hearing Examiner.*

FCC 74-325

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
KOMW, INC.
Concerning Construction Permit To Increase Power of Station KOMW, Omak, Washington

APRIL 2, 1974.

KOMW, Inc.,
Box 151.
Omak, Washington 98841

GENTLEMEN: This is in reference to your application, tendered for filing on October 9, 1973, for a construction permit to increase the power of standard broadcast station KOMW from 1 kilowatt to 5 kilowatts.

An examination of the engineering portion of your application reveals that the proposed 5-kilowatt operation meets the acceptance criteria of section 73.37(e)(3) of the Commission's rules. However, it violates section 1.569(b)(2)(i), because the KOMW site is located outside the 500-mile extension of the 0.5 mV/m-50 percent nighttime contours of the three unduplicated class I–A stations located within 30 kHz of KOMW's frequency of 680 kHz. The three class I–A stations involved are WSM, Nashville, Tennessee, 650 kHz; WNBC, New York, New York, 660 kHz; and WLW, Cincinnati, Ohio, 700 kHz.

As you know, the purpose of section 1.569 is to prevent the preclusion of possible future uses of the class I–A channels. You point out in the engineering portion of your application that the preclusion area caused by the 5-kilowatt proposal contains either no towns or towns with such a small population that they would be unable to support a class II–A station. This argument must be rejected since the prime purpose of II–A facilities is to provide primary nighttime service to unserved areas, and, generally, unserved areas tend to be sparsely populated. Moreover, the population density in many areas is, of course, subject to great change. *See, e.g.*, letter to West Side Radio, File No. BP-14016, dated November 14, 1973, FCC 73-1187.

However, although we disagree with your contention that your proposal would offer no prejudice to future II–A stations, we will nevertheless waive section 1.569(b)(2)(i) on our own motion because we find other reasons sufficient to warrant waiver of this section. One I–A channel, 650 kHz, is 30 kHz removed from your frequency, and involves possible overlap of 25 mV/m contours with a future class II–A assignment. In the past, we have waived section 1.569 when the adjacent I–A channel was 30 kHz removed because the amount of preclusion was negligible. *Peter L. Pratt*, 16 FCC 2d 967, 15 RR 2d 933 (1969); *Communications Associates, Inc.*, 25 FCC 2d 515, 20 RR

2d 255 (1970); *Blue Ridge Broadcasting Co., Inc.*, 23 RR 2d 887 (1972). We find no reason to depart from this policy. The other two frequencies, 660 kHz and 700 kHz, are 20 kHz removed from the frequency of KOMW, and thus the problem which possibly could occur in the future would be overlap of 2 in 25 mV/m contours with a II–A facility caused by the proposed power increase. Your proposal presents no problem with possible superpower operation by any class I–A station.

In considering your proposal we particularly note that more than 25 percent of the gain area which the KOMW power increase would serve is presently receiving no primary service from standard broadcast stations. In fact, your application complies with section 73.37 (e)(3) solely because of the first primary service which would be provided. Overall, your proposal represents a unique situation because it would serve more than 25 percent daytime unserved area; it would not affect possible superpower operation by any class I–A station; and any preclusion which it might cause to a new class II–A assignment in the future would have to occur on a channel 20 kHz removed from its present operating frequency. In view of these considerations, we find that the proposed KOMW power increase would serve the public interest and would not tend to prejudice the effectiveness of section 1.569.

Accordingly, we have this day waived section 1.569(b)(2)(i) and have accepted your application for filing.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*

FCC 74-352

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 89, 91, AND 93 OF THE COMMISSION'S RULES AND REGULATIONS TO ELIMINATE THE REQUIREMENT THAT AN OPERATOR OF A HIGH FREQUENCY TRANSMITTER POSSESS A RADIOTELEPHONE OPERATOR'S LICENSE OF ANY CLASS	Docket No. 20006

NOTICE OF PROPOSED RULEMAKING

(Adopted April 9, 1974; Released April 16, 1974)

BY THE COMMISSION:

1. The Commission has under consideration amendment of its Rules in the above-entitled matter. This is prompted in part by a petition for rule waiver submitted by the Utilities Telecommunications Council (UTC) requesting a waiver of Section 91.154(e) of the Rules to permit electric utilities companies to conduct field trials of the Electric Power Pool Control Network in the three to nine MHz band with employees who do not hold commercial radio operator's licenses.

2. Sections 89.163, 91.154, and 93.154 of the Commission's Rules require that operators of stations transmitting on frequencies below 25 MHz (the high frequency (HF) band) hold a commercial radio operator's license. Almost without exception, such operators hold the Restricted Radiotelephone Operator Permit, which is the lowest class of the radiotelephone operator license.

3. The Restricted Radiotelephone Operator's Permit is obtained by a simple application on the part of the applicant and the submission of a processing fee. The operating authority conferred is very limited, enabling the licensee to perform a minimal number of functions essential to the rendition of service of the station operated (such as on-off keying of the transmitter and speaking through the microphone). Such operators are prohibited from making any technical adjustments which may result in improper transmitter operation.

4. In 1947, at the International Telecommunication Conference held in Atlantic City, New Jersey, proposals embodying operators' qualifications and certificates underwent substantial revision in order to effect the modernization and simplification desired by the participating nations. It was decided that operator certificates would be required only of persons operating ship and aircraft radiotelegraph and radiotelephone stations and would not be necessary for the operation of other mobile stations. There is presently no international agreement requiring that the operators of fixed or land mobile stations be licensed.

5. Due to the long-distance propagation characteristics of the HF band, it has been Commission policy to license operators of such stations in order to minimize the interference potential due to improper operation. It is apparent, however, that the number of stations causing interference is negligible and that when interference is caused, it is almost always due to a technical, rather than an operational violation on the part of the licensee.

6. In addition, the quality and reliability of radio transmitters has improved considerably so that constant transmitter maintenance is not required. Controls relating to frequency, power, or modulation adjustment, which several decades ago were normally located on the exterior of the transmitter, have been relocated to the interior, restricting their accessibility to unauthorized service personnel. This is true with respect to transmitters operating above as well as below 25 MHz. Restricted Radiotelephone Operator licensees are not authorized to make transmitter adjustments of that nature.

7. Thus, it appears that the licensed operator requirements in the private land mobile radio services for radiotelephone systems below 25 MHz are no longer necessary and that the provisions of Section 318 of the Communications Act should be waived, and that these licensed operator requirements should be deleted.

8. Accordingly, we propose to amend Parts 89, 91, and 93 of our Rules to eliminate the requirement that operators of base or mobile stations transmitting on frequencies below 25 MHz, utilizing radiotelephony, hold a commercial radio operator's license or permit. In the interim, pending final resolution of this matter, the Petition for Rule Waiver submitted by the UTC requesting exemption of radio operators conducting field trials of the Electric Power Pool Network in the three to nine MHz band, from the requirements of Section 91.154(e), is granted.

9. Authority for the proposed amendments is contained in Sections 4(i), 303, and 318 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, interested parties may file comments on or before June 24, 1974, and reply comments on or before July 8, 1974. Relevant and timely comments and reply comments will be considered by the Commission before final action in this proceeding. In reaching its decision, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

10. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and fourteen copies of all statements, briefs, or comments filed shall be furnished the Commission. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

I. Part 89 of the Commission's Rules is amended to read as follows:

1. Section 89.163(a)(1) is amended to read as follows:

§ 89.163 Operator Requirements

(a) *Operation during the course of normal rendition of service-radiotelephone.* (1) The following classes of stations may be operated by an unlicensed person, if authorized to do so by the station licensee:

* * * * * * *

II. Part 91 of the Commission's Rules is amended to read as follows:

1. Section 91.154(c) is amended and pars. (d) & (e) deleted and designated [Reserved] to read as follows:

§ 91.154 Operator Requirements

* * * * * * *

(c) Except under the circumstances specified in paragraphs (a) and (b) of this section, and except as limited by paragraphs (g) and (h) of this section, an unlicensed person, after being authorized by the station licensee to do so, may operate from a control point a mobile, base or fixed station, or from a dispatch point a base or fixed station during the course of normal rendition of service.

* * * * * * *

III. Part 93 of the Commission's Rules is amended to read as follows:

1. Section 93.154(c) is amended and pars. (d) & (e) deleted and designated [Reserved] to read as follows:

§ 93.154 Operator Requirements

* * * * * * *

(c) Except under the circumstances specified in paragraphs (a) and (b) of this section, and except as limited by paragraphs (g) and (h) of this section, an unlicensed person, after being authorized to do so by the station licensee, may operate from a control point a mobile, base, or fixed station, or from a dispatch point a base or fixed station, during the course of normal rendition of service.

* * * * * * *

FCC 74-330

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Petition of
BENEDICT P. COTTONE
For Reconsideration of Ruling Concerning Stations WGCB, Red Lion, Pa. and WXUR, Media, Pa. Involving the Personal Attack Rule

APRIL 2, 1974.

STATIONS WGCB AND WXUR,
c/o BENEDICT P. COTTONE, Esq.,
Suite 908,
1730 M Street, N.W.,
Washington, D.C. 20036

GENTLEMEN: This is in reference to your Petition for Reconsideration, filed October 10, 1973, of the Commission's September 11, 1973 ruling concerning Stations WGCB, Red Lion, Pennsylvania and WXUR, Media, Pennsylvania.[1] In that ruling the Commission rejected your Application for Review of the June 8, 1973 Broadcast Bureau ruling which held that Stations WGCB and WXUR had failed to meet their obligations under Section 73.123(a) of the Commission's Rules and Regulations in that they broadcast a personal attack against the United Church of Christ (UCC) on the January 27, 1972 "Life Line" program, but failed to transmit to UCC a tape, transcript, or accurate summary of the attack and an offer of a reasonable opportunity to reply, within seven days of the attack.

In the instant Petition, you state that to apply the personal attack rule to the January 27 "Life Line" program is unconstitutional; that the ruling was a direct intrusion into the journalistic discretion and judgment of the licensee; that "the Bureau engaged in censorship by ruling that the content of the introduction to the proposed reply of the United Church of Christ could not include certain assertions"; that the Commission applied the personal attack rule in this case in a discriminatory and oppressive manner in that the "Life Line" program should be considered exempt from the rule, citing *Dorothy Healey*, 24 FCC 247, aff'd *Dorothy Healey* v. *FCC*, 148 U.S. App. D.C. 409, 460 F. 2d 917 (1972) in support of your contention; that the Commission failed to distinguish *Reverend Paul E. Driscoll*, (Broadcast Bureau ruling) 40 FCC 2d 448 (1973) from the facts of this case; and that petitioners were "solely singled out for an adverse ruling even though there was no complaint and even though the Bureau had knowledge of the fact that

[1] Pursuant to Commission Order in Docket No. 17141, WXUR ceased broadcasting on July 6, 1973.

104-035—74——8

many other stations throughout the country which carried . . . the 'Life Line' broadcast" did not comply with the personal attack rule.

We have examined all the pleadings herein, and conclude that our ruling of September 11, 1973 concerning Stations WGCB and WXUR was correct. However, we believe some comments should be made concerning various allegations set forth in your Petition for Reconsideration. You state that the Bureau engaged in censorship by ruling that the content of the introduction to the proposed reply of the United Church of Christ could not include certain assertions. This is an incorrect conclusion. Neither the Broadcast Bureau in its June 8 ruling nor the Commission in its September 11 ruling prohibited petitioners from making any statements in introducing the United Church of Christ's reply. Both rulings did state that "prefacing or concluding a reply to a personal attack with a repeat of or justification for the original attack, would not appear on its face, to constitute a reasonable opportunity to reply." That statement was not meant to dictate the content of Petitioner's introduction to the reply. The purpose of that statement was to put licensees on notice that prefacing or concluding a reply with a repeat of the original attack would not meet licensees' original obligations under Section 73.123(a) of providing the party attacked with a reasonable opportunity to reply, which is the purpose of Section 73.123(a). Thus, if the attacked party knew that if he accepted a station's offer of reply time he would subject himself to attack again at the time of such reply, it would discourage the attacked party from defending himself and thereby help to frustrate our goal of encouraging robust debate.

You also contend that the "Life Line" program should be considered an exempt program based on the Commission's and Court's rulings in *Dorothy Healey, supra.* In that case, the Commission ruled that the alleged attack broadcast on George Putnam's news commentary against Dorothy Healey occurred during an exempt program and therefore was not subject to Section 73.123(a) obligations. The United States Court of Appeals for the District of Columbia did not rule on this portion of the Commission's ruling. We reject your argument that our decision in *Dorothy Healey* requires us to find "Life Line" to be an exempt program within the meaning of Section 73.123(a). Section 73.123 (a) states that bona fide newscasts, bona fide news interviews and on-the-spot coverage of a bona fide news event and *commentary or analysis contained in the foregoing programs* shall be exempt from the obligations of the personal attack rule. "Life Line" and Mr. Putnam's news commentaries are broadcast in different formats. "Life Line" is a complete program within itself and is presented as a separate entity. Mr. Putnam's commentaries are broadcast as part of a regularly scheduled newscast and are exempt from Section 73.123(a) obligations solely because they are presented as part of a regularly scheduled newscast. Thus, the "Life Line" program does not qualify for that exemption because it is not a commentary within a regularly scheduled newscast.

Petitioners also argue that the Commission failed to distinguish its ruling in *Reverend Paul E. Driscoll, supra,* from the facts of this case. We do not believe that the Bureau's holding in the *Driscoll* case is applicable to this case. In the *Driscoll* case the Bureau stated:

However, it should be clear that not all charges of illegality present attacks on honesty, character, or integrity. One may assert that a person or group has in fact acted in violation of the law although the person or group assumed that such action was in full accord with the law's provisions. In such case, the charge is one of "illegality," but it is the judgment of the person or group in interpreting the law which is questioned, not their honesty, character or integrity.

In the instant case UCC's character, honesty and integrity were clearly attacked. During the January 27, 1972 "Life Line" program, UCC was alleged to have been a part of a conspiracy to cause prison unrest through illegal and violent means and to have financed "violent and/or subversive," anti-white, militant groups. There was no question as to the interpretation of the law in this case. The attacked party clearly recognized that it was accused of illegal conduct which reflected on its honesty, character and integrity.

As to petitioners' contention that they were "solely singled out for an adverse ruling even though there was no complaint" we stated in our ruling of September 11, 1973:

The Commission notes that WGCB and WXUR were the only two stations that asked for a ruling and provided sufficient information upon which a ruling could be completed. If other stations carried the program and have failed to comply with Section 73.123, the Commission will act on those cases when a complaint is received and/or sufficient information is submitted informing us of the details of the alleged violations.

Petitioners have submitted nothing to persuade us to change this determination.[2]

Accordingly, for the reasons set forth above the Petition for Reconsideration IS DENIED.

Commissioner Hooks concurring in the result.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[2] Subsequent to its September 11 ruling, it came to the Commission's attention that one complaint filed by the United Church of Christ as a result of the January 27, 1972 Life Line program was still outstanding. According to information obtained by the Complaints and Compliance Division of the Broadcast Bureau, the licensee is attempting to resolve this matter with the United Church of Christ.

FCC 74R-121

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of RADIO DINUBA CO., DINUBA, CALIF.	Docket No. 19566 File No. BPH-7567
KORUS CORP., DINUBA, CALIF. For Construction Permits	Docket No. 19567 File No. BPH-7657

ORDER

(Adopted March 29, 1974; Released April 2, 1974)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSTAINING.

1. The Review Board having under consideration the Initial Decision herein, the exceptions and briefs, and the request for oral argument, filed with respect thereto;

2. IT IS ORDERED, That oral argument before a panel of the Review Board IS SCHEDULED for April 25, 1974, commencing at 10:00 a.m., in Room 650, 1919 M Street, N.W., Washington, D.C.; that the parties who within five days after release of this Order file written notice of intention to participate in oral argument (Section 1.277(c) of the Rules) shall each be allowed 20 minutes for argument; that counsel for Korus Corp. may reserve part of its time for rebuttal; and that the order of appearance shall be:

Korus Corp.
Radio Dinuba Company
Chief, Broadcast Bureau

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-303

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
SAMMONS COMMUNICATIONS, INC., D.B.A. JOHNSTOWN TV CABLE CO., JOHNSTOWN, N.Y.	CAC-975 NY428
SAMMONS COMMUNICATIONS, INC., D.B.A. GLOVERSVILLE TV CABLE CO., GLOVERSVILLE, N.Y.	CAC-976 NY429
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted March 28, 1974; Released April 17, 1974)

BY THE COMMISSION: CHAIRMAN WILEY CONCURRING IN THE RESULT; COMMISSIONER ROBERT E. LEE CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER HOOKS CONCURRING IN PART AND DISSENTING IN PART.

1. Sammons Communications, Inc., d/b/a Johnstown TV Cable Company and Gloversville TV Cable Company, has filed applications for certificates of compliance to begin cable television service at Johnstown and Gloversville, New York, communities located in the Albany-Schenectady-Troy, New York market (#34).[1] Sammons proposes to carry the following television broadcast signals on its systems:

WAST (ABC, Channel 13), Albany, New York
WRGB (NBC, Channel 6), Schenectady, New York
WTEN (CBS, Channel 10), Albany, New York.
WMHT (Educ., Channel 17), Schenectady, New York
WKTV (NBC, Channel 2), Utica, New York
WOR-TV (Ind., Channel 9), New York, New York
WPIX (Ind., Channel 11), New York, New York
WNJU-TV (Ind., Channel 47), Linden, New Jersey

Carriage of Stations WAST, WRGB, WTEN, and WMHT is consistent with Section 76.61 of the Commission's Rules. Carriage of WKTV is grandfathered pursuant to Section 76.65 of the Commission's Rules.

2. In its original applications, Sammons proposed carriage of New York, New York-Linden-Paterson, New Jersey, market Stations WOR-TV, WPIX, and WNJU-TV. Sonderling Broadcasting Corporation, licensee of Station WAST, and Albany Television, Inc., licensee of Station WTEN, both of Albany, New York, objected to

[1] Although served by a common headend, each community will be provided the full complement of access services as required by Section 76.251 of the Rules. The system will each have 20-channel capacity.

carriage of these stations. Subsequently, in light of our decision in *Capitol District Better T.V., Inc.*, FCC 73-49, 39 FCC 2d 13 (1973), Sammons amended its applications to delete New York City area stations.[2] However, Sammons reserved its right to seek equality of treatment should any other cable system similarly situated obtain a modification or revision of the Commission's decision in *Capitol District, supra*. That decision was subsequently revised by our decision in *Commission on Cable Television of the State of New York*, FCC 73-1148, 43 FCC 2d 826 (1973), *recons. denied*, FCC 74-99, — FCC 2d — (released February 8, 1974), and carriage of the New York City area independent stations was authorized on cable systems in the Albany-Schenectady-Troy markets.[3] Therefore, we will authorize Sammons' original proposal to carry WOR-TV, WPIX, and WNJU-TV.[4]

3. In a request for special relief, Roy H. Park Broadcasting of Utica-Rome, Inc., licensee of Station WUTR (ABC, Channel 20), Utica, New York, requests that the Commission authorize carriage of this distant network signal on Sammons' cable systems. Sammons has indicated that it has no objection to carriage of WUTR should the Commission approve such carriage. Park submits that the proposed carriage of WKTV would be inequitable without similar carriage of WUTR.[5] In support of its argument, Park states that: (a) absent its grandfathered status, WKTV could not be carried on Sammons' cable systems because it is a distant network station; (b) WUTR would have been grandfathered along with WKTV, had it been an existing station at the time carriage of WKTV was first requested; (c) WUTR is a struggling new UHF station which must compete for its viewing audience and advertising revenues with WKTV, an established VHF station;[6] and (d) equivalent carriage of WUTR on the Johnstown and Gloversville cable systems will prevent a deterioration of the already substantial competitive imbalance between WKTV and WUTR.

4. In paragraph 66 of the *Reconsideration of Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326, 351 (1972), we recognized

[2] In *Capitol District Better T.V., Inc., supra*, the town of Colonie, located in the Albany-Schenectady-Troy market, sought a waiver of Section 76.61(b)(2) of the Rules to authorize carriage of New York City independent stations. The New York, New York-Linden-Paterson, New Jersey market (#1) is the third closest television market with independent broadcast stations. The Commission denied this waiver request and required compliance with Section 76.61(b)(2), which states in pertinent part: "That if [independent] signals of stations in the first 25 major television markets . . . are carried pursuant to this subparagraph, such signals shall be taken from one or both of the two closest such markets, where such signals are available."

[3] In *Commission on Cable Television of the State of New York, supra*, we granted a waiver of the leapfrog rule (Section 76.61(b)(2)) as it applied to carriage of New York City independents in the Albany-Schenectady-Troy market. In footnote 17 of the above-referenced decision, we stated that our action was dispositive of the leapfrog issue and that we would not deal with objections on that ground in the certificating process. Accordingly, the objections filed in the present case by Sonderling Broadcasting Corporation, licensee of Station WAST, and Albany Television, Inc., licensee of WTEN, both of Albany, New York, based exclusively on the leapfrog issue, are hereby dismissed as moot.

[4] Carriage of WNJU-TV is consistent with Section 76.61(b)(2), which permits carriage of a third independent station which is a UHF station located within 200 air miles of the reference point for the community of the system. Carriage of WOR-TV and WPIX is consistent with our decision in *Commission on Cable Television, supra*.

[5] Carriage of WKTV was authorized pursuant to a "Petition for Authority to Carry Distant Signals" (CATV 100-133) filed by Sammons' predecessor on November 15, 1966. Therefore, WKTV is grandfathered under our present Rules.

[6] The Utica market is a smaller television market located between two major New York markets, Albany-Schenectady-Troy (#34), and Syracuse (#35). WKTV, established in 1949, and WUTR, established in 1970, comprise the Utica market. WKTV has an average daily circulation of 93,000; that of WUTR is 25,500. *See Television Factbook*, Stations Volume, 1973-1974, Edition No. 43, pp. 547-b—575-b. Park states that WUTR has experienced serious financial losses throughout its 3-year history.

that, for a variety of reasons, systems with approved signals had not commenced operation, and determined that we would not disturb signals where rights had already vested. On the other hand, in the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 186 (1972), we expressed our intention to abide by our carriage rules and permit deviations only in compelling situations. Although Park has indicated that WUTR is experiencing serious competition from WKTV and that WUTR is in poor economic health, no hard evidence has been presented to indicate that carriage on Sammons' cable systems would result in a significant improvement in WUTR's competitive position. Such a change is, in fact, unlikely because WAST (ABC), which Sammons intends to carry on its systems, could demand network program exclusivity vis-a-vis WUTR. Accordingly, Park's request for special relief must be denied.

5. The franchises for Johnstown and Gloversville were awarded on November 7, 1963, and December 5, 1963, respectively, and pursuant to Section 76.13(b)(3) of the Commission's Rules, Sammons is required to explain how each system's franchise is substantially consistent with the provisions of Section 76.31. Sammons has made the following assurances: (a) the franchises were awarded in public meetings of the Common Councils of Johnstown and Gloversville; (b) both systems are presently substantially completed and service will be provided through the entire franchised areas within four years from the date of Commission certification; (c) although the franchises are of indefinite duration, Sammons is required by the Commission's Rules to submit franchises in strict compliance with our Rules by March 31, 1977; (d) the franchises specify the initial rates to be charged for regular subscriber services, and rate changes must be approved by the franchising authorities; (e) a local business office will be maintained in each community for the purpose of receiving and resolving subscriber complaints; (f) Sammons will seek such amendments of its franchises as are necessary to bring them into compliance with subsequent changes in Section 76.31 of the Commission's Rules; and (g) the franchise fees are 1 percent of gross monthly service receipts for Johnstown and 5 percent of such receipts for Gloversville. In light of these assurances, we are satisfied that there has been substantial compliance with our franchise requirements and that a certificate of compliance should be issued until March 31, 1977. *See CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10 (1972).

In view of the foregoing, the Commission finds that a grant of the subject applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the requests for special relief filed by Roy H. Park Broadcasting of Utica-Rome, Inc., ARE DENIED.

IT IS FURTHER ORDERED, That the applications for certificates of compliance filed by Sammons Communications, Inc., d/b/a Johnstown TV Cable Company (CAC–975) and Gloversville TV Cable Company (CAC–976) ARE GRANTED and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

STATEMENT OF COMMISSIONER ROBERT E. LEE

I dissent to that portion of the order that denies carriage of the UHF station in Utica.

I think our policy should recognize special consideration to a struggling UHF station, particularly where the cable is willing and able to provide carriage—no one objects.

National policy of developing UHF broadcasting is well established in Congress and the FCC.

This action is inconsistent with that policy.

FCC 74-367

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 73 OF THE COMMISSION'S RULES AND REGULATIONS CONCERNING THE TRANSMISSION OF NON-AURAL SIGNALS ON AN FM BROADCAST STATION SUBCARRIER PURSUANT TO A SUBSIDIARY COMMUNICATIONS AUTHORIZATION	Docket No. 20012 RM-1927

NOTICE OF PROPOSED RULEMAKING

(Adopted April 9, 1974; Released April 16, 1974)

BY THE COMMISSION:

1. The rules governing the transmission of programs on a subcarrier of an FM broadcasting station, set forth in Section 73.293, place no restriction on the nature of the signal used to modulate the subcarrier for the provision of the limited public services which are authorized. However, it is clear that when these rules were formulated, the immediate aim was to accommodate an aural (voice and music) service, and any special policy or technical questions which might have required solution if non-aural transmissions were contemplated were given no consideration. Accordingly, the Commission customarily has granted regular SCA authorizations only in cases where aural service was proposed.

2. Since about 1965 various proposals have been made to utilize the FM subcarrier for the conveyance of information prepared, transmitted, and presented at the receiving point for visual, rather than aural perception by the user. In a number of instances the Commission has granted experimental authorizations for the testing of these techniques, and the technical feasibility of providing non-aural services of various kinds on the SCA subcarrier has been generally established.

3. The Commission has determined quite recently that the subcarrier transmission of information for visual as well as aural reception by the specialized groups which the FM station licensee may serve pursuant to a Subsidiary Communications Authorization is fully consistent with the intended purpose of the SCA and, as a matter of policy, should be permitted.[1]

4. This Notice, therefore, deals primarily with the technical aspects of non-aural SCA transmissions, and, in that context, examines two questions: (1) what amendments to Section 73.319 of the rules—the engineering standards for SCA transmissions—become necessary or desirable when such transmissions are authorized on a regular basis,

[1] WFTL Broadcasting Co. (FCC 74-282) adopted March 14, 1974.

and (2) whether the specific parameters of the non-aural signals should be established by rule.

5. By this Notice, we are also responding to a petition (RM–1927) of John R. Porterfield, filed on February 18, 1972, which, among other things, seeks amendment of Section 73.293 of the Rules so as to affirmatively permit SCA facsimile transmissions. This particular proposal obviously is encompassed in the broader approach to non-aural subcarrier transmissions contemplated herein. Other rule amendments proposed by Mr. Porterfield will be disclosed and considered in context in the following discussion.

6. In developing engineering rules applicable to non-aural SCA transmissions, it appears we can take either of two approaches:

(a) We can attempt to classify the various systems, and develop detailed rules defining the structure of the transmitted signals, at least for the major categories of such transmissions; or

(b) We can follow the far simpler course of amending the rules only to the extent of adopting such technical limitations as appear necessary to insure that non-aural SCA transmissions will neither adversely affect the broadcast service of the FM station emitting the signals, nor increase the level of potential interference to other FM stations, but otherwise allow the SCA holder to provide subcarrier service by such means as appears feasible and suitable in each case.

7. The promulgation of standards for a particular system of non-aural transmission might be expected to have the effect of standardizing the kind of equipment employed by users of the system, would tend to promote wider use of the system, and the lowering of equipment costs to all users. Conversely, such standardization would limit flexibility of use, and, in the particular case may serve to preclude the rendition of an SCA service which otherwise might appear technically and economically feasible.

8. Illustrative of the latter point is Mr. Porterfield's proposal to provide an SCA facsimile service to persons who possess facsimile transceivers designed to operate primarily with land line telephones. He states that there are presently about 10,000 of these units in service. They are produced by several different manufacturers, and as among the various makes, utilize facsimile signals which differ somewhat in configuration. Mr. Porterfield states that these transceivers might be wired to SCA receivers, and an FM station, equipped to provide facsimile programming under standards compatible with the transceivers in his area, or, alternatively, to various groups of transceivers operating under differing standards, could provide a highly desirable subscriber service.[2]

9. It is his contention that the development of subscriber services to specialized groups has heretofore been hampered by two factors:

(1) Scheduling—the difficulty of choosing any particular time when all members of a specialized group, or even a majority of the group, will be able to audit an aural program.

(2) The lack of a printed transcript of the program material.

He believes that if the specialized program material were transmitted and received in facsimile, for perusal by the recipient at his leisure,

[2] The transceivers would be brought into operation selectively by tones transmitted on a subcarrier, according to the specialized group to which the subscriber belonged, and the facsimile standards utilized by the particular transceiver.

these impediments would be removed, and specialized subscriber services might be expected to expand.

10. It is apparent that the rendition of a service of the type described above would be severely restricted, if not made impossible, if the FM licensee were required to adhere to any single prescribed set of facsimile standards. In this connection, Mr. Porterfield points to Section 73.318 of the rules, which prescribes engineering standards for facsimile transmission. These standards presumably would have to be observed if facsimile programs were transmitted pursuant to an SCA, and their existence in the rules in their present form constitutes a bar to the implementation of the kind of facsimile service which he envisages.

11. In any case, he avers, the standards of § 73.318 are obsolete. They were adopted in 1948, a number of years prior to the adoption of the present SCA rules, and, together with Section 73.206, which permits main channel transmission of facsimile during periods not devoted to regular programming, as well as multiplex facsimile at all times, were intended to make realizable a concept, extant for many years, of a "radio newspaper" for the general public. The effective implementation of such a concept obviously required the employment of uniform standards for all transmissions. However, the "radio newspaper" never became a practical reality. Mr. Porterfield states that the last experimental "newspaper" transmission took place in 1948 (apparently at about the time the facsimile rules were adopted).

12. In view of this situation, and to afford the complete flexibility as to transmission standards which would be required to accommodate a service such as he proposes, he urges that the facsimile standards be deleted. He would include in Section 73.318 only a restriction on the bandwidth of the facsimile signal, and a requirement that its transmission comply with the SCA engineering standards (Section 73.319).

13. We believe it quite likely, if the facsimile engineering standards are retained in the rules, that they should be modernized. However, the weight of opinion may be with Mr. Porterfield and against the adoption or retention of any rules which define the configuration of the facsimile signal.

14. If we decide to retain facsimile standards, the considerations which dictate this course of action would appear to be applicable generally to other types of non-aural transmissions, and consideration should be given to the establishment of engineering standards, at least for the major categories of these transmissions.

15. Judging from the kinds of experimental authorizations given, and from general interest expressed, the majority of non-aural types of transmissions fall generally into one of three categories:

(a) Facsimile
(b) Slow-scan television
(c) Teletype and teleprinter

In addition to these basic kinds of non-aural signals, there are certain other systems intended to present information in visual form, which do not fall neatly in any of these categories. An example of these is the electrowriter, a system in which the motion and position of a stylus, used for writing or drawing, is converted into electrical signals whose

frequencies vary in accordance with the position of the stylus. These signals after transmission, are used at a receiver to control a pen whose motion and relative position duplicates that of the transmitting stylus. Thus, the graphic material is reproduced at the receiver simultaneously with its preparation at the transmitting point. To the extent that this system will provide a replica of transmitted graphic material in record form, it might be regarded as a specialized form of facsimile, even though the scanning methods of conventional facsimile are not employed.

16. We see no good reason why such systems should not be permitted, and do not propose to adopt rules which would exclude them. Insofar as the major categories of non-aural transmission are concerned, the teletypewriter and teleprinter codes appear well established, and we see little need for Commission action toward standardization in this category. However, we request comments with respect to the desirability of establishing standards for facsimile and slow-scan television. When a party favors such standardization, we invite suggestions on the actual content of such standards.

17. If, on the basis of the comments filed and the study of other relevant information, the Commission determines that the adoption of rules establishing engineering standards for facsimile and slow-scan television for SCA transmission is in the public interest, a further notice will be issued soliciting comments on specific standards.

18. On the other hand, should we not adopt such standards for SCA use, and in the absence of any indication that the facsimile standards of § 73.318 have any other present application, we contemplate action looking toward the deletion of those standards. We also will undertake any necessary amendment of SCA engineering standards contained in Section 73.319. With respect to the latter section, we consider at least one addition to be necessary—the specification of the permissible base band width of the non-aural signal. Of course, other technical requirements may be desirable, and we solicit comments in this regard.

19. The potentiality of the SCA signal for creating cross talk in the main channel signal, or for producing emissions outside of the normal transmission channel, of course, is affected by two major factors, the deviation of the FM signal by the SCA subcarrier, and the composition of the signal which modulates the subcarrier. The subcarrier deviation can be monitored and controlled by the station operator. The base band occupied by the modulating signal depends on the characteristics of the signal, which, to avoid possible adverse effects, often must be modified by filtering before application to the subcarrier. That such a technique must be applied has been recognized by experimenters with non-aural signals. While the necessary filter might be interposed between the non-aural apparatus and the subcarrier generator, we assume, in most cases, it is included in the non-aural apparatus itself.

20. Considering the extremely broad band which might be occupied by some non-aural signals ("slow scan" television is, after all, a relative term, and some systems of this nature which scan an image at a rate which is "slow", compared to conventional television might be, in terms of occupied bandwidth, entirely unsuitable for SCA transmis-

sion), we believe that reliance should not be placed on the equipment manufacturer to decide, in each case, what base band limitations are appropriate.

21. We therefore contemplate the adoption of a rule which will limit the band width of the non-aural signal used to modulate the subcarrier, and which would specify the permissible level of signal components falling outside the permitted pass band. Since a station licensee normally would not have the means for determining whether the non-aural signal generator which he desires to employ meets the requirements of such a rule, we are considering the desirability of a rule which would preclude the employment by an FM licensee of any apparatus for the generation of a non-aural signal which was not furnished by its manufacturer with a written certification that its output fully complies with such band width limitations the rules may specify.

22. In addition to the rule amendments which we have previously discussed, Mr. Porterfield also has proposed an amendment of Section 73.293(c). He would modify this rule, which limits periods of SCA operation to those during which the main channel is programmed, to permit SCA facsimile transmissions "at any time between midnight and 7 AM, and for not more than one hour between 7 AM and midnight, without main channel programming." The rendition of the kind of facsimile service which he proposes would be facilitated by such a rule amendment, since it would permit the use of facsimile transceivers for the recording of the SCA transmissions during hours when the transceivers would be unlikely to be handling communications over the telephone system.

23. While this Notice invites comments which relate to other aspects of Mr. Porterfield's proposal, and we are therefore, in effect, granting his petition for rule making insofar as it relates to these matters, we are denying it with respect to the proposal just outlined. The rule amendment sought would permit the operation of an FM broadcast station solely for the provision of a service which, while it has been found to be "broadcast related" may be, in many respects, indistinguishable from services provided by stations operating on non-broadcast frequencies. A primary justification for authorizing a broadcast station to conduct such a service pursuant to an SCA is that it may be rendered by the station at the same time the station is performing its essential function—the provision of a broadcasting service to the general public. The subcarrier service is at all times secondary and subordinate to the main carrier service, and is consistently so treated in our rules.

24. Any change in our rules which would tend to divorce the SCA service from the broadcasting service, and permit it to be provided separately, even if only for a portion of each day, would seriously erode, if not entirely eliminate an element basic to the whole SCA concept. Accordingly, we consider it futile to explore this portion of Mr. Porterfield's proposal in a rule making proceeding.

25. In the light of the above, comments are requested on the following:

(a) What, if any, engineering standards should be adopted for the configuration of the major categories of non-aural signals authorized for SCA transmission (particularly for facsimile and slow-scan television)?

(b) Is any useful purpose to be served by the retention in the rules of the present provisions for simplex facsimile transmissions in § 73.266, or, unless the imposition of SCA signal standards is decided upon, of the facsimile standards of § 73.318 in their present, or in some amended form?

(c) What base band limitations shall be included in § 73.319 to insure that non-aural signals employed for subcarrier transmission will not adversely affect main carrier or stereo subcarrier transmission, or cause emissions of appreciable magnitude outside the normal frequency spectrum of the FM station? Are any other technical restrictions necessary or desirable?

26. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, interested parties may file comments on or before May 23, 1974, and reply comments on or before June 3, 1974. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may also take into account other relevant information before it, in addition to the specific comments requested by this notice.

27. In accordance with the provisions of Section 1.419 of the rules, an original and 14 copies of all comments, reply comments, pleadings, briefs, and other documents shall be furnished the Commission. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its Headquarters, 1919 M Street, N.W., Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-365

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Public Notice
CONCERNING PETITIONS FOR RULEMAKING AFFECTED BY UNITED STATES-MEXICO FM BROADCASTING AGREEMENT

APRIL 11, 1974.

PETITIONS FOR RULEMAKING AFFECTED BY U.S.-MEXICO FM BROADCASTING AGREEMENT—ALLOWING OPPORTUNITY TO AMEND, SUPPLEMENT, OR OTHERWISE PLEAD IN CERTAIN INSTANCES

Pending negotiation and effectuation of the U.S.-Mexico FM Broadcasting Agreement (Agreement) concerning the "allotment and use" of FM channels along the common border between the United Mexican States and the United States, action with respect to petitions for rulemaking for FM channel assignments in the 199 mile border area of Arizona, California, New Mexico, and Texas, have been held in abeyance. The Agreement has been effectuated by appropriate changes to the Commission's Rules and Regulations as concerns domestic commercial FM channel assignments. See Orders, adopted October 3, 1973, and March 28, 1974, respectively (43 F.C.C. 2d 293 and FCC 74-309).[1]

It is deemed appropriate to allow the petitions filed prior to November 9, 1972 (when the United States signed the Agreement and related special arrangement), to be amended or supplemented, or the parties thereto to take any other like action to reflect any change in circumstance since the petition was filed (particularly channel assignments made pursuant to the Agreement) and to adduce additional data and information that is considered germane. The rulemaking proceedings affected are:

RM	Petitioner	Summary of proposal
1510	Dr. A. J. A. Watzlavick	Assign channel 272A to Schulenberg, Tex.
1639	Wilson County Broadcasting Co	Assign channel 232A to Floresville, Tex.
1741	Walter H. Herbort, Jr. and Ramon Montemayor.	Assign channel 234 to Pearsall, Tex.
1869	Meyer Gottesman	Assign channel 297 to San Diego, Calif.
1901	Albert C. Freeman	Assign channel 272A to Bullhead City, Ariz.
1979	Shoblom Broadcasting, Inc	Assign channel 257A to Parker, Ariz. (see also RM-2047).
2042	Bisbee Broadcasting, Inc	Assign channel 261A in lieu of 221A at Bisbee, Ariz., and assign 221A at Sierra Vista, Ariz.
2047	Rick Murphy	Assign channel 258 to Parker, Ariz. (see also RM-1979).

[1] Also affected are the assignment and use of educational noncommercial FM channels. See § 73.507, which was added to our rules as a consequence of the Agreement (43 F.C.C. 2d at 298); "Interim Policy", 43 F.C.C. 2d 1237 (1973); and Notice of Proposed Rule Making in Docket No. 19987, adopted March 28, 1974 (FCC 74-310).

Any such amendment or supplement must be filed with the Commission no later than May 23, 1974.

The following procedure shall be followed: If additional material is filed, Public Notice will be given and any interested party will be allowed to file supporting or opposing statements and replies thereto. The provisions of Section 1.405 (a) and (b) of the Commission Rules shall govern such submissions with regard to the 30-day period for filing statements, the 15-day period for filing replies, service upon parties, and other matters. This action is taken pursuant to paragraph (c) of Section 1.405. A copy of this Public Notice will be served on each petitioner. These rulemaking proceedings will be given prompt consideration.

Action by the Commission April 9, 1974. Commissioners Wiley (Chairman), Lee, Reid, and Hooks.